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A

PRACTICAL AND ELEMENTARY

# Abridgment of the Common Law

AS ALTERED AND ESTABLISHED

BY THE

RECENT STATUTES, RULES OF COURT,

AND

MODERN DECISIONS;

COMPRISING A

## FULL ABSTRACT OF ALL THE CASES

ARGUED AND DETERMINED

IN THE

**Courts of Common Law, & on Appeal.**

WITH

THE RULES OF COURT, FROM M. T. 1824, TO M. T. 1840, INCLUSIVE,

AND

**THE STATUTES DURING THE SAME PERIOD.**

WITH

*CONNECTING AND ILLUSTRATIVE REFERENCES TO THE EARLIER AUTHORITIES AND EXPLANATORY NOTES.*

BY CHARLES PETERSDORFF, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

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# LORD LYNDHURST,

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TO WHOM

THE ORIGINAL PUBLICATION WAS DEDICATED,

THE

Following Pages

ARE

MOST RESPECTFULLY INSCRIBED.

# PREFACE.

SEVERAL years have elapsed since the Editor designed, and, to the best of his ability, completed, " A Practical and Elementary Abridgment of the Common Law Reports, Rules of Court, and Statutes, with a Series of Explanatory Notes, Illustrative References, and Analytical Tables." The original publication embraced a very extensive range; it embodied the substance of nearly Two Hundred and Sixty Volumes, and comprised an Epitome of every important Case then published; besides containing the practically useful Rules of Court and Statutes. This Work terminated with the Decisions, Acts of Parliament, and Rules of Court, pronounced and in force prior to Michaelmas Term 1824. On the completion of that attempt to furnish the Profession with a modern practical and systematic Abridgment of the Common Law, the Editor intimated his intention of endeavouring to increase its utility by publishing, at an appropriate time, a Supplement, or Supplements. The present period appears well adapted for the realisation of that design. The interval between the close of the year 1824 and the termination of 1840 has been more prolific in important variations in our system of Jurisprudence, and in the practical administration of the Law, than any other period of our judicial and legislative history. Almost every portion of the system has been altered, modified, or rendered more fixed and certain, and in some instances it has been restored to the same state as it existed in earlier ages. The Criminal Law has been greatly improved, offences defined with precision, its severity mitigated, and its procedure simplified. The principles governing or affecting Real

Property have been the subject of numerous legislative enactments, and made far more definite in their nature and intelligible in their application. The Rules of Descent have been divested of the incongruities and inconsistencies which formerly characterized them. The Practice of the Courts and the Principles of Pleading have been beneficially varied, and rendered more uniform and better adapted to the effective administration of justice. These comprehensive changes have greatly diminished the value of many of the existing Abridgments and Digests. The laws introduced by the Legislature, and the Rules of Court, within the last sixteen years, with the decisions upon them, may be truly said to form a new era in English Jurisprudence. There is scarcely a point of law however minute, or a principle however general, that has not within that time been the subject of Parliamentary investigation, or of legal decision or judicial comment. A work, therefore, of the description now presented to the Profession, (if executed with moderate accuracy,) cannot fail to be of considerable practical utility, and materially facilitate the researches of the inquirer. There is no publication, of which the Editor is aware, that comprises, under a connected but alphabetical arrangement, the Modern Law as established by the changes to which reference has already been made. Many valuable elementary Works and Digests are to be obtained, but they are confined to particular selected subjects of investigation, to mere indexes, to limited periods, to statutes, or to decisions. A comprehensive consolidation of the whole of the Modern Cases, Statutes, and Rules of Court, is now attempted to be given. The more effectually to execute this design, much time and labour have been devoted to arrange the materials according to a plan at once analytic and alphabetical. The following enumeration of the contents of the Notes and References will shew the information sought to be furnished beyond the mere Abridgment of the Cases, Statutes, and Rules of Court:—

1. A reference to the different books in which the same case is reported.

2. A reference to the cases in which the same point has been determined or affirmed.

3. A reference to the cases or elementary writers in which the same rule or principle is recognised or adverted to.

4. A reference to those cases which are at variance with the decision abridged, or to such as have expressly overruled it.

5. A reference to the acts of Parliament connected with each case.

6. A series of Notes, in which an attempt has been made to connect the cases with the present practice, and to explain the general effect; comprising such principles of the Law as are not included within the general scope of the Abridgment.

An endeavour has been made to frame the Abstract of the Decisions on a plan simple and perspicuous. The Reports themselves generally contain a copy of the pleadings, a full statement of all the facts, the arguments of counsel at length, and almost every sentence uttered by the several judges in pronouncing their opinions. In the present publication so much only of the pleadings, the facts, and the arguments of counsel, are introduced in a condensed form as may be necessary to connect the case with the decision. The judgments are compressed into one concise statement, including the most important observations, unless there is a difference of opinion on the Bench; in which case, the individual opinions are given seriatim.

From the vast number of cases, (exceeding 15,000), the Editor has been compelled to exercise a discretion as to the length of the argument given, and as to the propriety of introducing all the decisions in the text. In pursuing this course, he has been influenced by the importance of the question determined, and by the circumstance that the ruling was merely by a single Judge at Nisi Prius or in the Bail Court, where little time for research or reflection was allowed. To give all the cases in the text would augment the Work to a size which would be destructive of the object sought to be attained.

The Editor originally intended to refer to the American edition of the Abridgment itself, and to the useful Supplement published some time since at New York; but he feared to encumber the Work with references which might not, by their utility, compensate the space they would occupy.

TEMPLE, 20*th October*, 1841.

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A

PRACTICAL ABRIDGMENT

OF THE

# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

## Queen's Bench, Common Pleas, & Exchequer,

FROM

MICH. TERM, 4 GEO. 4. TO MICH. TERM, 3 VICT.

AND OF

THE RULES OF COURT, STATUTES, &c. &c. &c.

## Abandoning Proceedings*.

HARGRAVE *v.* HOLDEN, M. T. 1834. Ex. 3 *D. P. C.* 176—ROBINSON *v.* STODDART, M. T. 1836. B. C. 5 *D. P. C.* 266.

A party who has signed judgment too soon, or irregularly, may avoid an application to set it aside by giving notice of having abandoned it.

THE plaintiff had signed judgment for want of a plea. A summons had been obtained to set aside the judgment as irregular. The plaintiff gave notice that he should not attend the summons, and that he had abandoned the judgment. The defendant persevered, and obtained two summonses. A Judge at chambers made an order to set aside the judgment with costs.

*Per Cur.*—The order must be set aside. An irregular judgment may be withdrawn; and, therefore, the subsequent summonses should not have been obtained.

* Irregular or premature, or otherwise unsustainable proceedings, may be abandoned by a party without payment of costs, when he gives notice to the other side of his intention to waive them, sufficiently early to prevent the opposite party from unnecessarily incurring costs. Hence, notice not to appear to process, given before the expiration of the eight days allowed for the purpose, would enable the plaintiff to discontinue the suit free from the obligation of paying costs to his adversary.

An abandonment may also be implied, as where a writ is sued out against two defendants, and the plaintiff elects to declare only against one. In such instances, the defendant's right to costs against whom the plaintiff has abstained to proceed, depends upon whether he has or has not duly appeared before he had notice of the plaintiff's having confined his declaration to his co-defendant.

CLARKE *v.* CROCKFORD, E. T. 1835. Ex. 3 *D. P. C.* 693.

But in such case, the party must offer all that his adversary could be entitled to by making his rule absolute.

ON a rule to cancel a bail bond, with costs, on the ground that the affidavit to hold to bail was defective, it appeared, that, after the rule nisi had been obtained, the plaintiff's attorney offered to the defendant's attorney a consent to a Judge's order to the same effect as that contained in the rule, the costs to be costs in the cause.

*Per Cur.*—The offer should have been to pay the costs of the rule nisi.—*Rule absolute with costs.*

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**Abandonment of Settlement.** See tit. *Poor, Settlement of.*

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**Abandonment of Costs.** See tit. *Costs.*

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**Abandonment of Wife.** See tit. *Husband and Wife.*

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**Abandonment of Voyage.** See tit. *Insurance.*

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**Abatement of Freehold.** See tit. *Descent.*

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**Abatement of Legacies.** See tit. *Legacy.*

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**Abatement of Nuisances.** See tit. *Nuisance.*

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## Abatement of Suit*.

I. BY DEMISE OF THE CROWN, p. 3.
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V. BY INSOLVENCY, p. 7.
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IX. BY WANT OF PARTIES.—See tits. *Misjoinder—Non-joinder—Parties to Actions.*
X. BY LUNACY, p. 8.

* An abatement, in the Common Law sense of the term, is an entire overthrow or destruction of the suit, so that it is quashed and ended; 3 Bl. Com. 16 a; but in the sense of the Courts of Equity, an abatement signifies only a present suspension of all proceedings therein. Story's Com. 238.

## I. BY DEMISE OF THE CROWN *.

## II. BY DEATH OF PARTIES †.

CHECCHI ET UX. *v.* POWELL, H. T. 1827. K. B. 6 *B. & C.* 253.

The death of the wife abates a suit brought by her and her husband for a debt due to her *dum sola.*

THIS was an action by husband and wife for the recovery of a debt due from the defendant to the wife previous to her marriage. Notice of trial had been given and countermanded. The wife having died since the notice and countermand, a rule for judgment as in case of a nonsuit was obtained.

On shewing cause, it was contended, that there must be a recovery before the debt could be vested in the husband; it was not a debt that would survive to him, as the claim was not in his own right. The Court however discharged the rule, on the ground, that if the wife was a necessary party to the suit, by her death the action had abated.

*See post, tit. "Husband & Wife," and Bac. Abr. "Baron and Feme," C. 3. & F.* 1; *Cro. Car.* 227; *Carth.* 405.

* The stat. 1 Edw. 6, c. 7, enacts, "that no action, suit, bill, or plaint, depending between party and party, in any *Court of Record*, shall be discontinued by reason of the death of the King; but the process, pleas, demurrers, and continuances shall stand good in the same condition as if the King had lived." This statute does not extend to proceedings at the suit of the Crown. (See 7 Coke, 31; 3 Bulst. 314; Dyer, 65; Cro. Car. 10; Id. 104). By the act of 1 Anne, c. 8, it is provided, that "no writ, plea, process, or other proceeding, on any indictment or information, or for any debt to her Majesty or her successors, shall be discontinued and put without day by her or their death, but shall continue in force, and be proceeded upon. And no original writ, writ of nisi prius, commission, process or proceeding out of any Court of equity, or upon any office or inquisition, nor any writ of certiorari or habeas corpus in any case criminal and civil, nor any writ of attachment or process for contempt, shall be abated or discontinued by the death of the Queen, or her successors." See 2 Lev. 207; 1 Stra. 43; 2 Id. 782.

† The death of a *sole* plaintiff or defendant before verdict or judgment by default, (2 Wils. 83), or at any time prior to the commission day at the assizes, (1 Salk. 8; 7 T. R. 31); or before the actual sitting day in term, (3 B. & P. 549), abates the suit; but the death of one of *several* plaintiffs or defendants has not that effect, (8 & 9 Will. 3, c. 11, s. 6; the death, however, should be suggested on the roll, (1 Stark. 511; 2 D. P. C. 435), nor will the death of a sole plaintiff or defendant between verdict and judgment, (17 Car. 2, c. 8), whether it be interlocutory or final, (8 & 9 Will. 3, c. 18, s. 6), abate the suit, and the costs may be taxed after the party's decease, (1 Kenyon, 378), provided the cause of action was such as would continue in the survivor. (4 Taunt. R. 884; see 3 & 4 Will. 4, c. 42, s. 2). The term *judgment* in the act extends not only to a decision at law, but to a decree in a Court of equity. *Owen* v. *Curzon*, 2 Vern. 237. The judgment must be regularly *entered* within two terms *after the verdict*, by the express terms of the statute; and the Court will not relieve the parties, unless the delay be attributable to the Court itself. *Lawrence* v. *Hodgson*, 1 Y. & J. 368.

A *writ of error* is an action within the 7th sect. of 8 & 9 Will. 3, c. 11, and therefore does not abate by the death of one of several plaintiffs in error; *Clarke* v. *Rippon*, 1 B. & A. 586; though, where a sole plaintiff in error dies, or a feme sole marries before errors assigned, the writ abates; but the death or marriage of a defendant in error, before or after errors assigned, does not cause the writ to abate.

By stat. 7 Geo. 4, c. 47, s. 9, the death, resignation, or removal of any party suing or being sued as a *public officer*, under the provisions of that act, shall not abate the suit; but the same may be continued, prosecuted, and carried on in the name of any other of the public officers for the time being.

The death of the attorney in the cause does not abate the proceedings, but notice should be given to the opposite party of the appointment of the attorney substituted before the latter can proceed; *Ryland* v. *Noakes*, 1 Taunt. 342; but if the town agent happens to be the attorney upon the record, the decease of the

DOWBIGGIN *v.* HARRISON, H. T. 1830. K. B. 10 *B. & C.* 480; S. C. 5 *M. & R.* 431.

It seems the 17 Car. 2, c. 11, which enacts that a suit shall not abate by death of a party between the verdict and judgment does not apply to a nonsuit;

THE cause was tried on the 15th of December, 1827, and the plaintiff nonsuited. The defendant died on the 5th of January, 1828. The jury process being returnable in the next Hil. Term.

The costs being taxed, the defendant's administrator sued out a scire facias to revive the judgment against the plaintiff; upon which he obtained a rule to shew cause why that writ should not be set aside, on the ground that nothing had been done upon the nonsuit until Michaelmas Term, 1828, three entire terms having intervened between the death and the signing of the judgment in Michaelmas Term, 1828; and that therefore the action abated at common law; and that the stat. 17 Car. 2, c. 8, did not extend to nonsuits; but that if it did, as the judgment was not entered within two terms, according to the statute, the defendant's representative could not call it in aid.

In this view the Court concurred, and made the rule absolute, to set aside the sci. fa.

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BULL *v.* PRICE, H. T. 1831. C. P. 7 *Bing.* 237; S. C. 5 *M. & P.* 2.

unless the defendant has been delayed by the plaintiff seeking to set aside the nonsuit, and death during the period of delay intervenes.

THE defendant died after the granting of a rule nisi for setting aside a nonsuit, but before it came on for argument, viz. on the 12th September, 1830.

*Per Cur.*—The defendant died after she would, in the ordinary course of proceedings, have been entitled to judgment of nonsuit. Had it not been for the act of the plaintiff, she would have secured that advantage. It must, therefore, be taken as if there was actually a judgment signed in the usual course. Had the defendant died *before the time* at which the judgment might have been signed, the case would have been different.

*See Toulmin* v. *Anderson*, 1 *Taunt.* 227.

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GRIFFITH *v.* WILLIAMS, E. T. 1830. Ex. 1 *C. & J.* 47.

And where new trial is granted, the Court will prevent advantage being taken of the fact,

AFTER the plaintiff had obtained a verdict, a rule for a new trial was granted; subsequently, the plaintiff died. In seeking to make the rule absolute, it was urged, on the part of the plaintiff, that the setting aside the verdict would occasion a failure of justice, as no new trial could be had without the risk of the death being as-

country attorney will not affect his right to continue the action. *Taunton* v. *Goforth*, 6 D. & R. 384. An information at the suit of the Crown abates by the death of the defendant, if after trial, but before judgment. *Att.-Gen.* v. *Buckley*, Parker, 464.

On the abatement of a suit by death, each party pays his own costs.

*In equity*, the death of a sole plaintiff or defendant abates the suit; but if the whole interest of a party dying survives to another party, so that no claim can be made by or against the representatives of the party dying, as if a bill is filed by or against trustees or executors, and one dies, not having possessed any of the property in question, or done any act relating to it, which may be questioned in the suit: or if a bill is filed by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives, the proceedings do not abate. So, if a surviving party can sustain the suit, as in the case of several creditors, plaintiffs in behalf of themselves and other creditors, the proceedings do not abate. For the persons remaining before the Court in all these cases, either have in them the whole interest in the matter as legatees, or at least are competent to call upon the Court for its decree. Mitf. Eq. Pl. 58; *Fallows* v. *Williamson*, 11 Ves. 306.

signed for error. To this it was intimated, that the Court would have had no difficulty, if they had thought that the case required further consideration, as they should have imposed the terms of the verdict being entered as of the assizes when the case was first tried, or of the defendant's undertaking not to assign error.

by imposing terms on the applicant.

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DOE *d.* TAYLOR *v.* CRISP, E. T. 1839. B. C. 7 *D. P. C.* 584.

THIS cause was entered for trial at the Summer Assizes, 1835; a verdict was taken, subject to a special case, which was not settled and set down for argument until Michaelmas Term in the following year. The defendant died in the previous February. *Williams*, J., refused to allow judgment to be entered nunc pro tunc, at the instance of the successful party, as the delay in setting down the case could not be considered as that of the Court, but originating in his own neglect.

And where the successful party has been guilty of delay in his proceedings, the Court will not suffer judgment to be signed nunc pro tunc.

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VAUGHAN *v.* WILSON, M. T. 1837. C. P. 5 *Scott*, 404; S. C. 4 *Bing. N. S.* 116—S. P. KEY *v.* GOODWIN, E. T. 1832. C. P. 1 *M. & Scott*, 620.

AFTER issue joined, and the cause set down for trial, the defendant became insolvent, and a meeting of his creditors was held on the 19th May. At this meeting the plaintiff was present, when it was agreed that the defendant should withdraw his plea, and the plaintiff be at liberty to sign judgment. At a subsequent meeting, held on the 5th June, it was resolved that a fiat should be issued against the defendant, on the petition of the plaintiff. A fiat was accordingly issued on the 6th; but before it was opened, on the 8th, the defendant died. On motion to enter judgment nunc pro tunc—

*Per Cur.*—The general rule is, that judgment cannot be entered up after the death of the defendant; but if the event occurs after a special verdict or special case, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may still be entered up as of the term in which the postea was returnable, or judgment would otherwise have been given. This proceeds upon the principle, that delay, arising from the act of the Court, ought not to prejudice the suitor.

Nor in any case, except where the delay arises from the act of the Court itself.

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PALMER *v.* COHEN, M. T. 1831. K. B. 2 *B. & Ad.* 966.

AFTER verdict in an action for a libel, and before judgment, the plaintiff died; his executor entered up judgment. On motion to set it aside, on the ground that the representatives could not enter up judgment on a verdict in an action of *tort*, it was contended, that the power was given expressly by the 17 Car. 2, c. 8, s. 1, and that no distinction existed between actions ex delicto and ex contractu. In this the Court concurred, observing, that no question had been raised on that point since the statute passed.

The 17 Car. 2, c. 8, extends to verdicts in actions for torts, as well as contracts.

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JOHNSON *v.* BUDGE, M. T. 1834. Ex. 1 *C. M. & R.* 647; S. C. 5 *Tyrw.* 197; S. C. 3 *D. P. C.* 207.

A CAUSE was entered for a sittings, which were adjourned. The day before the adjournment day, the defendant died. On application to

In case of death of parties, Sit-

tings in term not esteemed as one day, so that trial could have reference to first day of term, nor can special adjournment day be obtained to prevent abatement of suit by death*.

the Judge at Nisi Prius to try the cause some day within the term, he having to sit elsewhere in the intermediate time. He fixed the last day of term, and adjourned the sittings to that day, that the cause might then be taken, if the Court should think that such a course ought to be pursued.

On motion for that purpose—*Per Parke*, B.—"It is impossible that the cause can be taken on the last day of term, as it would greatly interfere with the course of the public business; it can only be taken out of turn by consent." And the Court refused to interfere.

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JOHNSON *v.* HAMILTON, H. T. 1836. Ex. 1 *M. & W.* 149; S. C. 4 *D. P. C.* 762; 1 *Tyrw. & G.* 45.

The Court will, under some circumstances, stay the postea, in the hands of the associate, where it appears that plaintiff died before verdict.

AFTER verdict for the plaintiff, motion was made in arrest of judgment, or to stay the postea, on the ground that the plaintiff was dead before the trial. It appeared that the plaintiff was a seafaring man on board a vessel, called the Champion, bound from Ireland to Liverpool; but that the Champion had never been heard of since; that it appeared from the entries in Lloyd's List for February, 1835, that in that month heavy storms prevailed in the Irish sea, and spars and oars, having the name of "Champion" upon them, had been washed on the shore of Carnarvonshire, and that the insurers of the vessel had paid for her as a total loss.

*Per Cur.*—The rule of law on which the presumption of death rests, is not satisfied by the evidence presented in these affidavits. The lapse of time in this case is of course wholly insufficient to afford ground for such presumption. Then the statement from Lloyd's List is mere hearsay; that publication is not legal evidence of the fact of the loss; nor are the other circumstances stated at all conclusive: to induce us to stay the postea, strong grounds must be shewn.

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MAFFEY *v.* GODWYN, M. T. 1832. K. B. 1 *N. & M.* 101.

A suit abates by death of parties, where it is referred, and an award made, but no verdict or judgment entered up.

AN action of assumpsit after declaration was, by consent, under a Judge's order, referred to arbitrators, the costs to abide the event of the cause. The arbitrator awarded—the plaintiff had no right of action. After the order of reference was made a rule of Court, the defendant died. On an attachment for non-performance of the award, it was held that the suit abated by the death of the defendant; the order of reference, being simply of all matters in difference, not ordering any judgment or verdict to be entered up.

* At the Nisi Prius sittings in the term, the practice is to make up the postea as of the day on which the cause is tried. The death of the defendant after the first Nisi Prius day in the term, but before the day as of which the postea appears upon the record to be made up, abates the suit. (*Halliday* v. *Saunderson*, 1 Alcock & Napier, 147).—*Irish.*

Quære, whether, in such a case, where the plaintiff had been in all respects ready for trial on the first Nisi Prius day, and a postponement is occasioned by the direction of the Court, the postea might not be made up as of that first day?—Id.

Where a consent is entered into, and made a rule of Court for a postponement of a trial, upon payment of costs, the subsequent death of the party to whom the costs are payable does not abate the proceedings, so as to deprive his personal representative of the usual remedies, by action or attachment, for enforcing the payment of the costs. (*Brownrigg* v. *Hamilton*, 1 Alcock & Napier, 170).

REX *v.* JUSTICES OF YORKSHIRE, H. T. 1827. K. B. 9 *D. & R.* 204; S. C. 6 *B. & C.* 152, *but not S. P.*

The death of one of two parties who have obtained a certiorari, does not prevent the Court from proceeding to dispose of the matter.

B. AND C. obtained a writ of certiorari to remove an order of Justices, allowing surveyors' accounts. It appeared that one of the surveyors attended with his accounts, but had omitted to take the assessments; upon which a rated inhabitant of the township objected that the magistrate could not proceed to investigate the matter. The magistrate, being of opinion that it would be impracticable to proceed without having the assessments before him, desired the surveyor to attend with all the necessary documents at the petty sessions. He did so, and the accounts were allowed. A certiorari was granted; but, before argument, C. died. The Court, nevertheless, allowed the case to be argued.

## III. BY OUTLAWRY*.

## IV. BY CRIMINAL CONVICTION†.

## V. BY INSOLVENCY‡.

## VI. BY BANKRUPTCY§.

* See Com. Dig. tit. "Outlawry," D. 3; 2 Lutw. 1510—1601; M'Clel. & Y. 196; 2 M. & W. 412; post, tit. "Outlawry."

† See *Bisse* v. *Harcourt*, Carth. 137.

‡ By 53rd sect. 1 & 2 Vict. c. 110, it is provided, that, whenever any assignee or assignees shall die or be removed, or a new assignee or assignees shall be appointed, in pursuance of the provisions of this act, no action at law or suit in equity shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new appointment, allow the name or names of the surviving or new assignee or assignees to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same.

In the 7 Geo. 4, c. 57, s. 26, there was a similar enactment.

The taking the benefit of the Insolvent Act has, so far as relates to the plaintiff, the same effect upon the suit as the bankruptcy of a trader. (See 2 Wils. 358, 372, 378, and infra).

§ The bankruptcy of the plaintiff does not abate the action, (1 Vent. 193; 5 Mod. 88; 3 T. R. 437; 7 East, 64; 2 Wils. 272; 18 Ves. 426); but the defendant may plead it whenever he has a day in Court to plead. (*Kinnear* v. *Tarrant*, 15 East, 622; see 6 B. & C. 692). The assignees, in all cases after interlocutory judgment or verdict, are entitled to proceed in the bankrupt's name, (*Hewitt* v. *Mantell*, 2 Wils. 372; *Kretchman* v. *Beyer*, 1 T. R. 463), or make themselves parties to the suit. (See *Page* v. *Bauer*, 4 B. & A. 345). In one case, the Court allowed the official assignee to be made a party after issue joined and notice of trial given. (*Baker* v. *Neaver*, 1 C. & M. 112).

The 6 Geo. 4, c. 16, s. 67, enacts, "that whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, no action at law or suit in equity shall be thereby abated; but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." In bankruptcy, the death of the party before he has been declared a bankrupt abates the fiat; (*Ex parte Beal*, 2 Ves. & B. 29); and a joint fiat against a firm, of which one is dead at the time, is said to be void; but a fiat does not abate by the death of a partner after the bankruptcy found. (*Beasley* v. *Beasley*, 1 Atk. 97: *Ex parte Smith*, 5 Ves. 295). In equity, the bankruptcy or insolvency of the plaintiff is pleaded, where the subject-matter of the suit has, by the bankruptcy or insolvency of the party, become vested in the assignees. (Mitf. Eq. Pl. 232). It is sometimes classed among pleas in abatement to the person; (Cooper, Eq. Pl. 248); but, as it is

### VII. BY COVERTURE*.

HOLLIS *v.* FREER, E. T. 1836. C. P. 3 *Scott*, 284; S. C. 2 *Bing. N. S.* 719; 5 *D. P. C.* 47.

Marriage of female plaintiff after plaint in the county court abates an action of replevin.

THIS was an action of replevin. The plaintiff, a female, married after the plaint had been made in the county court; the defendant removed the cause into the Court of C. P. by recordari facias loquelam, and then pleaded the marriage in abatement. The plea was held to be good.

### VIII. BY BECOMING AN ALIEN ENEMY†.

### X. BY LUNACY‡.

## Abatement Pleas in Civil Proceedings.

See also tits. *Husband and Wife—Indictment—Infant—Jurisdiction, Pleas to—Misnomer—Non Joinder.*

I. DIFFERENCE BETWEEN PLEAS IN ABATEMENT AND IN BAR§.

II. WHAT MAY OR MAY NOT BE PLEADED IN, AND EFFECT OF PLEADING IN, p. 9.

III. APPEARING AND PUTTING IN BAIL, p. 10.

IV. WITHIN WHAT TIME TO BE PLEADED, p. 11.

V. FORM OF PLEA, p. 11.

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VII. CHANGING VENUE AFTER, p. 14.

VIII. REPLICATION AND OTHER PLEADINGS, p. 14.

IX. NISI PRIUS RECORD, p. 14.

effect a plea that the plaintiff has no title, or that the title which he had has been transferred to others, it seems, so far as the plaintiff is concerned, to be a plea in bar. But it is so no further than he is concerned, because it does not deny the right to sue as existing in another person, nor dispute the validity of the rights which are made the subject of the existing suit. (Beames' Pl. Eq. 119). It seems, that, on a plea of bankruptcy, all the facts and circumstances which are necessary to establish the sufficiency of the proceedings in bankruptcy, and to shew the party to be lawfully declared a bankrupt, must be specially set forth.

* If plaintiff feme sole marry after writ issued, (6 T. R. 265; 4 East, 522), the suit abates; but not if she be defendant and marry after process sued out, Lofft, 27), or after interlocutory judgment; and in the latter case the plaintiff may proceed to final judgment and an execution against her, without suing out a scire facias to make the husband a party. (4 East, 521; 3 M. & S. 557: see *Langford* v. *Foot*, 2 M. & Scott, 309).

In Chancery, by the marriage of a female plaintiff, the proceedings become abated or discontinued; but, upon the marriage of a female defendant, the proceedings do not abate, though her husband ought to be named in the subsequent proceedings. (Mitf. Eq. Pl. 58).

† See 8 T. R. 166, 4 East, 502.

‡ The insanity of either of the parties will not affect the proceedings. See 7 D. P. C. 22.

§ Matters which shew that the *present* action cannot be sustained, must be pleaded in *abatement;* those which shew an action cannot be supported *at all*, in

X. EVIDENCE ON, p. 15.
XI. TRIAL OF IN GENERAL AND BY RECORD, AND OBTAINING NEW TRIAL, p. 15.
XII. JUDGMENT IN, p. 16.
XIII. COSTS IN, p. 16.

## II. WHAT MAY OR MAY NOT BE PLEADED IN *, AND EFFECT OF PLEADING IN.

PRESCOTT *v.* STEVENS, E. T. 1831. B. C. 1 *D. P. C.* 57.

THE plaintiff had issued non-bailable process; without discontinuing such proceeding he commenced a new action by arresting the

Pendency of suit for the same cause of action may be pleaded in abatement †.

*bar;* (4 T. R. 224). Hence, that one of several plaintiffs is jointly liable with defendant is in bar. (2 B. & P. 120; 2 Chit. Rep. 539); and that defendant is jointly liable with another person, in abatement. (*Nowland* v. *Geddes*, 1 East, 634). In the former, the plea shews, that the action is not sustainable at all; in the latter, it may be on joining the omitted party.

The effect, therefore, of pleas of this description when successfully pleaded is, that the particular action is defeated; but, on the other hand, the right of suit itself is not extinguished, and the plaintiff on resorting to a new action, if the objection were founded on the frame or tenor of the proceedings, or if the objection were to the ability of the party, a new action may be brought when that disability is removed.

Coverture in the defendant, non joinder in actions ex contractu, or that the suit is prematurely brought, may be pleaded in abatement, but not that a writ of error is pending, (Carth. 136); although the proceedings may on that suggestion be stayed, (4 Burr. 2454); nor is misnomer now a ground for such a plea, (see post, tits. *Amendment—Misnomer—Parties to Actions*); nor can a defect in the writ be pleaded, as oyer of the writ is no longer obtainable, (*Peake* v. *Davis*, 5 Taunt. 653, n.); or a variance between the writ and declaration, (*Deshons* v. *Head*, 7 East, 383; S. C. 3 Smith, 363); or want of proper addition of the parties. (*Gray* v. *Bennett*, 3 B. & P. 395).

Matter pleaded in abatement by one of several defendants, enures to the benefit of the others jointly sued. (2 Lord Raym. 926; 1 M. & P. 26).

* The following is the order to be observed in pleading pleas of this class at Common Law:—

I. Plea to the jurisdiction, (Co. Lit. 303. a).
II. Plea in abatement.
1. To the person of the plaintiff, (Co. Lit. 303. a.).
2. To the person of the defendant, (Co. Lit. 303. a.).
3. To the count, (Co. Lit. 303. a.).
4. To the writ for matter appearing upon the face of it, (Co. Lit. 303. a.)
5. To the writ for matter dehors, (3 E. 3, 30).
6. To the writ for matter ex post facto.
III. Plea in bar of the action, (Co. Lit. 303. a.), Com. Dig. Abatement, C.

In Chancery all declinatory or dilatory pleas are properly pleas, if not in abatement, at least in the nature of pleas in abatement; and therefore, in general, the objections founded thereon must be taken *ante litem contestatam*, by plea, and are not available by way of answer or at the hearing. (Beames' Pl. Eq. 55). And it has been said, that pleas of these several kinds may be successively pleaded, one after another, in their proper order, that is to say, first declinatory pleas; secondly, dilatory pleas; and thirdly, pleas in bar. For it has been said, though no man shall be permitted to plead two dilatory pleas at several times, nor several bars, because he may plead them all at once, yet after a plea to the jurisdiction, he may be admitted to plead in bar, because it is consistent with those pleas to plead in bar at the same time. (Cooper, Eq. Pl. 226).

† And the Court sometimes will stay the proceedings. (*Nicholls* v. *Lefevre*, 3 D. P. C. 135; *Parkin* v. *Scott*, 1 Taunt. 565; and see 3 B. & Ad. 945; et post, *Sowter* v. *Dunston*, 1 M. & R. 508).

A plea in abatement is not an issuable plea, within the meaning of a judge's order or rule of court, that the defendant shall plead issuably. (1 Burr. 59; Barnes, 263.)

defendant; who having pleaded the pendency of the prior suit in abatement, a motion was made for leave to discontinue or to take the plea off the file. But *Taunton*, J., refused the application.

*See Barnes*, 169; 2 *Stra.* 1206; 6 *T. R.* 616.

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HOLLIS *v.* FREER, E. T. 1836. C. P. 3 *Scott*, 284; S. C. 2 *Bing. N. S.* 719; S. C. 5 *D. P. C.* 47.

Or in replevin, that the plaintiff, pending the suit in the Court below, or before removal, married.

THIS was an action of replevin after plaint in the county court, and before removal into the Common Pleas, the plaintiff, a feme sole, married. The defendant obtained a writ of *re. fa. lo.*, and then pleaded the coverture in abatement. On demurrer, the case of *Morgan* v. *Painter*, 6 T. R. 265, was relied on; where it was decided, that if a plaintiff in an action takes a husband after suing out the writ, and before declaration, coverture cannot be given in evidence under the general issue, but must be pleaded in abatement. And of that opinion were the Court, who observed, that the defendant's suing out the writ of *re. fa. lo.* made no difference.

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CANTWELL *v.* EARL OF STIRLING, H. T. 1832. C. P. 8 *Bing.* 174; S. C. 1 *M. & Scott*, 297.

A statement which can be rejected as surplusage, cannot be made the subject of a plea in abatement.

To an action on a bill of exchange, the defendant pleaded in abatement that he was sued as a peer, and also "as having privilege of Parliament." On demurrer to the plea, the Court said, the defendant complains of a mis-statement in what is mere matter of addition; but, to sustain this objection, it should appear that the addition in question is material: for it is laid down in Com. Dig. Abatement, F. 22, "If the defendant be named A. B. of P., he may say that is A. B. of D., and not of P. So, if he be named A. B., smith, he may say he is A. B., carpenter, and not smith. But if the addition be immaterial, a mistake cannot be pleaded in abatement: as in an action against A. B., citizen, of Y., one of the company of M., it is no plea that he was not of the company. These are cases of mere idle description, the name of itself being sufficient to distinguish the defendant. In like manner, and for the same reason, we may throw out of the declaration here the words, "having privilege of Parliament."

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## III. APPEARING AND PUTTING IN BAIL BEFORE PLEADING*.

CASSEN *v.* BOND, M. T. 1828. Ex. 2 *Y. & J.* 531.

To enable a defendant to plead in abatement, a render is equivalent to the justification of bail.

THE defendant put in bail, and pleaded in *abatement;* afterwards, exception was taken to the bail, and he gave notice of adding and justifying fresh bail, and subsequently rendered in due time. The Court held that the render was equivalent to a justification of the bail, and that the plea was well pleaded.

* The defendant cannot plead in abatement before declaration, (2 Chit. Rep. 7; Id. 735), or before he has appeared, (2 Chit. Rep. 8), or, where necessary, before bail put in, (2 D. & R. 252); but bail need not justify, (2 East, 406), except in Exchequer. (Forr. 49, sed qu. *Cassen* v. *Bond*, supra, and 2 East, 406; 11 Id. 411, 413, n. 13; Id. 170).

## IV. WITHIN WHAT TIME TO BE PLEADED*.

RYLAND *v.* WORMALD, E. T. 1837. Ex. 2 *M. & W.* 393; S. C. 5 *D. P. C.* 581.

THE declaration was delivered on the 8th March. On the 13th, (12th being Sunday), defendant pleaded in abatement. On that day the plaintiff signed judgment, contending that such pleas were not within the R. H. 2 W. 4, c. 8; but the Court held, that the time for pleading was extended by the rule, and that it did not apply merely to pleas in bar.

The four days within which the pleas must be delivered, are calculated exclusively of the first and inclusively of the last day.

*See Jennings* v. *Webb*, 1 *T. R.* 277; *Long* v. *Miller*, 2 *Stra.* 1197; 1 *Peters. Abr.* 32.

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SOWTER *v.* DUNSTON, M. T. 1827. K. B. 1 *M. & R.* 508.

IN this case two actions had been brought; in one, the plaintiff withdrew the record, and in the other the plaintiff was nonsuited. A third being now brought, the defendant, after plea, made an affidavit, disclosing the above facts, and stating that the first and third actions were for one and the same demand, and that if defendant was liable at all to the demand of the said plaintiff, it was jointly with Dunston, Richards, Moore, Verbeke, and divers other persons.

Under special circumstances, the time has been extended.

*Per Cur.*—Such a defence is by plea in abatement, and the defendant might have special leave to plead the non-joinder after the four days, if any oppression had been shewn by affidavit to the Court.

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## V. FORM OF†.

WADE *v.* STIFF, M. T. 1827. C. P. 1 *M. & P.* 26.

ACTION of trespass against several. One of the defendants pleaded a misnomer, concluding his plea with praying judgment of the writ, and that the same may be quashed, &c. Held, that, as a

A plea in abatement, applicable only to one defendant; praying judgment of the writ ge-

* All pleas of this description must be delivered within four days, calculated, as stated in the case in the text, from the delivery or notice of the declaration, whether plaintiff declares in term time or in vacation, unless it be between the 16th August and the 24th October. (2 Will. 4, c. 39, s. 11). Sunday is included in the computation, if it be not the last of the prescribed number of days. (3 T. R. 642). Should the plea not be delivered within the limited time, the plaintiff may sign judgment, (4 T. R. 520), or reply the delay as an estoppel. (1 Vent. 235). Before the abolition of imparlances (see tit. "Imparlance"), a plea in abatement was not allowed after the defendant had imparled generally, (2 Bl. Rep. 1094; 4 T. R. 224; 2 M. & S. 484); and if so pleaded, it was bad on general demurrer, (6 T. R. 369), or judgment might have been signed. (7 T. R. 447, n).

† The strictest adherence to form is required. (3 T. R. 185; 5 Id. 485). The primary rules to be observed in framing these pleas are, that they must embody some sufficient matter of law, or matter of record, or matter of fact; they must be single, precise, and certain, exempt from repugnancy, confer on the plaintiff a better writ, and conclude in a manner technically correct; for if a plea which contains matter in abatement only, inartificially conclude *in bar*, final judgment will be given; for, by concluding as in bar, the defendant admits the writ to be valid; but upon pleas in bar, a contrary rule obtains, as the Court will give such judgment as appears to them to be proper, upon consideration of the whole of the record. (See 10 East, 87; 1 B. & A. 172; 1 Salk. 297; 3 T. R. 185). A plea beginning and ending in abatement is in abatement, though its subject-matter be in bar; (*Godson* v. *Good*, 6 Taunt. 587; 2 Marsh. 299); but a plea ending in bar is in bar, though its subject-matter is in abatement. (1 East, 634).

nerally, and that it may be quashed, is bad*.

misnomer of one of several defendants in trespass can only operate to abate the writ as to him, the prayer of judgment was bad on general demurrer.

*See Rex* v. *Cook*, 2 *B. & C.* 618; *S. C.* 4 *D. & R.* 114, *post.*

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HILL *v.* WHITE, M. T. 1839. C. P. 8 *D. P. C.* 13.

The defendant may plead in abatement as to part, and in bar to the residue: a new assignment in such cases is unnecessary.

IN an action of assumpsit for work and labour as an attorney, and a plea in abatement, alleging that the promise was made by the defendants jointly with others, and issue thereon, it appeared, that some of the contracts which were the subject of the action were made by the defendants alone, and others, jointly with other persons. The Court held that the defendants had not made out their plea; that the plaintiff was not bound to new assign; and that, as the plea was undeniable, he was entitled to recover the whole of his demand; and that the defendants might have divided their plea, and pleaded in abatement to some part, and in bar to the remainder.

*See Foxwist* v. *Tremaine*, 2 *Saund.* 210, n. (*l*); *Harries* v. *James*, 5 *T. R.* 553; *sed qu. Colson* v. *Selby*, 1 *Esp.* 452.

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DIGBY *v.* ALEXANDER, E. T. 1832. C. P. 1 *M. & Scott*, 559; S. C. M. T. 1832. C. P. 2 *M. & Scott*, 581; S. C. 8 *Bing.* 416.

If a Scotch peer be sued as a common person, the plea must shew that he was a peer at the time the writ was issued.

TO an action on a bill of exchange, directed to the defendant as the "Right Honourable the Earl of Stirling," and accepted by the defendant by the name or title of "Stirling," the defendant's plea in abatement began by setting out the royal proclamation, reciting the death of the Earl of Balcarras, and commanding the peers of Scotland to assemble on a particular day at Holyrood House to choose in his room a peer of Scotland to sit and vote in the House of Peers for the then present Parliament; the plea then goes on to state, that, on the day mentioned in the proclamation, divers of the peers of Scotland, in obedience thereto, met at Holyrood House; that, at the said meeting, the long or great roll of the peers of Scotland was called over; that the defendant, being Earl of Stirling, was present at the meeting for the purpose of giving his vote as a peer of Scotland at the said election; that, upon the title of Earl of Stirling being called, he claimed to vote as Earl of Stirling, and to be entitled to the honours and dignity of Earl of Stirling, and then and there answered to his title of Earl of Stirling; and his vote was then and there taken and received by the clerks of session, and the oath required by law to be taken by him as a peer of Scotland administered to him by such clerks of session; and that he did, as Earl of Stirling as aforesaid, vote at the said election. On demurrer, the Court held, that was sufficient, observing, that every fact stated in this plea may be true, and the conclusion may yet be false. The defendant does not allege, that he, being Earl of Stirling, voted on the occasion he mentions, but that he voted as Earl of Stirling. There is nothing more stated upon the face of the plea than would have been primâ facie evidence of the fact of the defendant's being Earl of Stirling; besides, the plea no where alleges, that, at the time of issuing the writ in this cause, the defendant was Earl of Stirling, and liable to be sued by that name.

* Sed vide *Staples* v. *Heydon*, 2 Ld. Raym. 926.

## VI. AFFIDAVIT OF TRUTH OF PLEA*.

DAVIDSON *v.* CHILMAN, M. T. 1834. C. P. 1 *Bing. N. S.* 297; S. C. nom. DAVIDSON *v.* WATKINS, 3 *D. P. C.* 129.

A plea of privilege by an attorney, is a plea in abatement requiring an affidavit.

THE defendant being sued in this Court, pleaded that he was an attorney of the Queen's Bench. The plaintiff signed judgment on the ground that the plea required an affidavit of its truth.

On motion to set the judgment aside, the Court refused to interfere, on the ground that the plea of privilege is merely a subordinate division of the class of pleas in abatement, and ranks as a plea in abatement in Comyns's Digest, "Abatement" (D).

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BOWER *v.* KEMP, H. T. 1831. Ex. 1 *C. & J.* 287; S. C. 1 *D. P. C.* 281; WESTERDALE *v.* KEMP, 1 *Tyrw.* 263, *n.*

Affidavit of verification, when it refers to the declaration, cannot be sworn before the latter is delivered;

DECLARATION delivered 27th of November. On the 29th, the defendant pleaded, that "*the said promises in the declaration*" were made by him and others. The affidavit was sworn at H. on the 13th. The defendant signed judgment on the 1st. Per *Bayley*, B.—A plea in abatement, *referring to the declaration*, cannot be supported by an affidavit sworn before the former is delivered.

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JOHNSON *v.* POPPLEWELL, T. T. 1832. Ex. 2 *C. & J.* 544; S. C. 3 *Tyrw.* 714.

but, after judgment signed, the Court set it aside, on the ground of contrivance in delivering the declaration after post-hours on Saturday night.

DECLARATION delivered after post-time on Saturday, 28th of April. The defendant, who resided in Yorkshire, pleaded a non-joinder. The affidavit was sworn in that county on the 17th. The Court set aside a judgment, which had been signed, on an affidavit of merits, and on the payment of costs, apparently on the ground of

* The stat. 4 & 5 Anne, c. 16, s. 16, provides, that an affidavit verifying the truth of the plea shall be annexed to all pleas in abatement. (See 1 Peters. Abr. 55). The act only applies where the matter of the plea is dehors the record. (*Grey* v. *Gedneff*. 3 B. & P. 395).

The 3 & 4 Will. 4, c. 42, s. 8, enacts, that no plea in abatement, for the non-joinder of any person as co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

The affidavit was formerly allowed to be sworn prior to declaration; but now, it appears, from the cases cited in the text, that the party cannot be sworn to the truth of the affidavit until after the plaintiff has declared. The affidavit must be intitled in the cause, (2 Stra. 1161), unless annexed to the plea. (*Prince* v. *Nicholson*, 5 Taunt. 333; 1 Marsh. 70; 5 Taunt. 533). If there be no affidavit, or a defective one, as where the affidavit does not agree with the plea, there being a variance in the Christian name, the plaintiff may sign judgment. (*Richards* v. *Setree*, 3 Price, 197). But it is no objection to such an affidavit, that the addition of the deponent is not stated, though the language of the R. H. T. 2 Will. 4, is general. (1 D. P. C. 693, sed qu. *Lawson's case*, 1 C. & M. 481; S. C. 3 Tyr. 489; 2 D. P. C. 40).

If the affidavit cannot be obtained in time to deliver with the plea, application should be made to a judge for an extension of time. (See *Johnson* v. *Popplewell*, 2 C. & J. 544; 2 Tyrw. 715). It is irregular to have it sworn before the defendant's attorney, but it is not rendered a nullity on that ground, though it may be set aside. (*Horsfall* v. *Matthewman*, 3 M. & S. 154). The affidavit may be made by the defendant, or any other person cognizant of the facts alleged. (Sed vide *Long* v. *Comber*, 4 East, 348, but there the declaration was in existence; and see *Pence* v. *Davy*, 1 Keny. 364; Sayer, 293; 13 East, 190; 1 Peters. Abr. 57; and 4 M. & S. 332).

contrivance in delivering the declaration so late; and intimated that the defendant, on application, might have obtained further time to plead.

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POOLE *v.* PEMBREY, H. T. 1833. Ex. 1 *D. P. C.* 693.

The affidavit must strictly agree with the plea in describing the parties.

THE declaration described the parties as S. P. and Ann Mary his wife. In the affidavit they were stated as S. P. and Mary Ann his wife. Judgment held to be regularly signed, as there was no identity between the declaration and the affidavit.

*See Prince* v. *Nicholson*, 5 *Taunt.* 333; S. C. 1 *Marsh.* 70: *Richards* v. *Setree*, 3 *Price*, 197.

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JONES *v.* SMITH, E. T. 1838. Ex. 6 *D. P. C.* 557; S. C. 3 *M. & W.* 526.

Affidavit verifying plea of *coverture* need not state residence of husband to be within jurisdiction, as such plea is not within 3 & 4 Will. 4, c. 42, s. 8.

THE defendant pleaded her coverture in abatement. It was objected, that the affidavit annexed to the plea did not contain the statements required by the 3 & 4 Will. 4, c. 47, s. 8, (see tit. Non-joinder); but the Court held, that the act only applied to the non-joinder of co-contractors; for the 9th section of 3 & 4 Will. 4, c. 42, enacts, that the party may reply, that the other person named in the plea has been discharged by bankruptcy or insolvency, which clearly shews it could not have reference to a plea of coverture.

*See tit. Non-joinder.*

## VII. CHANGING VENUE AFTER.

WIGLEY *v.* DUBBINS, M. T. 1826. C. P. 12 *Moore*, 91; *S. C.* 4 *Bing.* 18.

After plea in abatement, the venue cannot be changed.

IN an action for goods sold, after plea of non-joinder in abatement, motion was made to change the venue. It was contended, that there was a wide distinction between such pleas and pleas in bar, as the defendant is only allowed four days to plead in abatement. The rule of Court is, "that, although the declaration be delivered seven days before the last day of the next precedent term, or after, yet before plea, upon oath made, the venue may be changed, upon motion, in transitory actions, in the next term after."

*Per Cur.*—We cannot favour pleas in abatement more than pleas in bar, even though in the latter a longer time is allowed to plead than in the former.

## VIII. REPLICATION AND OTHER PLEADINGS*

## IX. NISI PRIUS RECORD.

PEPPER *v.* WHALLEY, M. T. 1835. K. B. 5 *N. & M.* 437.

It is not requisite to set

THIS was a motion to set aside a verdict, or to arrest the judgment, on the ground that there had been a plea in abatement, and judg-

* A replication to a plea to the "*writ*," beginning "the *declaration* ought to be quashed," is good on demurrer, the allegation being surplusage. (*Sabine* v *Johnstone*, 1 B. & P. 60).

To a plea in abatement, the demurrer need never be special, however technical the character of the objection. (*Lloyd* v. *Williams*, 2 M. & S. 484).

ment of *respondeat ouster*, but no entry of this plea; and judgment had been made up on the Nisi Prius roll. *Combe* v. *Pitt*, 3 Burr. 1682; and *Dobertrees* v. *Chancellor*, 5 Mod. 392; S. C. 1 Ld. Raym. 329, were cited in support of the application; but the Court held, that, as since the Reg. Gen. H. T. 4 Will. 4, rules 1 and 15, the entry of the proceedings on the record for trial is the first entry of the proceedings in the cause, the entry of the plea and judgment was immaterial.

out in the issue and Nisi Prius record a previous plea in abatement, and judgment of *respondeat ouster* therein.

## X. EVIDENCE ON*.

### Fowler *v.* Coster, 1828. N. P. *M. & M.* 241.

This was an action on a bill of exchange, where the non-joinder of a joint contractor was pleaded in abatement. Lord *Tenterden*, C. J., permitted the defendant to begin, and said, "that the most convenient rule was, that, wherever it appears on the record, or by the statement of counsel, that there is really no dispute about the sum to be recovered, that the damages are either nominal, or mere matter of computation; then, if the affirmative is on the defendant, he is entitled to begin."

The defendant in an action on a bill of exchange, on a plea of non-joinder, has been permitted to begin;

### Morris *v.* Lotan, 1832. N. P. 1 *M. & Rob.* 233.

Indebitatus assumpsit for goods sold. Plea, non-joinder of others as defendants. Lord *Denman*, C. J., ruled that the plaintiff should begin; but that the defendants might do so by admitting the amount claimed.

but, unless the amount be admitted, the plaintiff is entitled.

## XI. TRIAL OF GENERALLY†, AND BY THE RECORD, AND GRANTING NEW TRIALS‡.

### Wade *v.* Birmingham, H. T. 1827. K. B. 1 *M. & R.* 111, *n.*

After issue joined on a plea in abatement, a rule was obtained to shew cause why the trial should not be postponed till the sittings after Easter Term, on an affidavit, stating that, in order to establish the defence, it would be necessary to bring witnesses from

The trial of a plea in abatement will not be postponed at the request of the defendant.

* As the plea raises a collateral issue, neither admitting nor denying the sum claimed or sought to be recovered as damages, the plaintiff should be prepared to prove the amount of loss or injury sustained, otherwise, though the issue be found for him, he will only be entitled to a nominal recompense, (*Welcher* v. *Le Pelletier*, 1 Campb. 481), instead of substantial damages. Hence, when defendant pleads her coverture to an action for goods sold, her counsel was permitted to begin, only on condition of admitting the delivery of goods to the amount claimed. (*Lenen* v. *Higgins*, 3 Stark. N. P. 178). On the other hand, it has been sometimes held, that the question of damage is a distinct inquiry, that never arises until the issue on the plea is determined; and that it ought not, therefore, to regulate the right to begin. (*Jackson* v. *Hesketh*, 2 Stark. N. P. 518). Mr. Starkie (Evidence, vol. ii. p. 1,) considers the order of proof to be discretionary with the Court; such discretion to be governed by a consideration of convenience in such cases.

When the plaintiff is allowed to begin, he may, it seems, confine himself to proof of the damages, and reserve his case in reply to the plea. (*Stansfield* v. *Levy*, 3 Stark. N. P. C. 8). See Best, On Right to Begin, &c.

† If the jury omit to assess the damages, a venire de novo must be awarded.

‡ In *Shew* v. *Hislop*, (4 D. & R. 241), it is said, there was no instance of a new trial, being granted on a plea in abatement; but, in *Ewer* v. *Ambrose*, (3 B. & C. 746; S. C. 5 D. & R. 629), that indulgence was granted.

Ireland, and obtain much evidence from public records, parish registers, and other documents there, without which he was advised &c. that he could not safely proceed to the trial of this cause; especially as this deponent was advised &c. that he could not safely proceed to trial without the testimony of Sir William Betham, Knt., Ulster King at Arms.

*Per Cur.*—Although there might be cases in which it would be reasonable to postpone the trial of a plea in abatement; yet that, in general, where a party puts on the record a plea unconnected with the merits, he ought to be prepared with evidence to support it; and that the indulgence now prayed for would be contrary to the spirit of the act of parliament on dilatory pleading.

*S. P.* 2 *Chit. Rep.* 5.

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KERBEY *v.* SIGGERS, E. T. 1835. Ex. 2 *D. P. C.* 659.

Pendency of prior suit for the same cause, proved by production of the record of the writ though not served;

THE defendant pleaded in abatement *auter action pendent*, concluding with *prout patet per recordum*, and, on being ruled, produced the record of the writ of summons issued in the Court of Common Pleas. It was objected that it had not been served first. The Court held, that, if the fact were so, application should have been made to take the writ off the file.

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KERBEY *v.* SIGGERS, E. T. 1835. Ex. 2 *D. P. C.* 659.

but the roll must be regularly made up.

THE plaintiff issued two writs, one out of this Court, and the other out of the Exchequer. The first was never served; on the second the plaintiff declared. The defendant pleaded to the second action, another action pending for the same cause in this Court. The plaintiff replied nul tiel record, and served the defendant with a notice to produce. The defendant made up a roll from the præcipe of this Court. The Court directed it to be cancelled, with costs.

## XII. JUDGMENT*.

## XIII. COSTS†.

POOLE *v.* PEMBREY, H. T. 1833. Ex. 1 *D. P. C.* 693.

On setting aside a plea in abatement for irregularity, no costs are allowed.

*Per Cur.*—Neither party has costs on a plea in abatement; and you are not entitled to ask for them in setting aside a plea for irregularity.

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WALL *v.* LYON, M. T. 1832. C. P. 1 *D. P. C.* 714; S. C. 9 *Bing.* 411; 2 *M. & S.* 579.

An amendment after plea in

THE R. M. T. 1654, s. 17, directs, that, after plea in abatement, the declaration shall be amendable upon costs, and liberty to plead

* On an issue in fact the judgment for plaintiff is peremptory, (1 Lev. 163); on an issue in law, that the defendant answer over, (1 Vent. 137; 2 Wils. 367; 1 East, 542), which he must do within four days (1 D. P. C. 265). For the defendant it is always that the writ be quashed. (2 Saund. 210).

† The defendant is not entitled to costs when the plaintiff enters a *nil capiat per breve*, (12 Mod. 145; Barnes, 120; S. C. Prac. Reg. 6), nor when on account of such plea, he moves to quash his own writ. (1 Stra. 638; sed qu. R. H. T. 2 Will. 4, see post, *Sci. Fa.*) On *demurrer*, each party pays his own costs. (1 Salk. 194; S. C. 1 Ld. Raym. 336; S. C. Comb. 482; see 6 T. R. 524; Id. 395). On issues in *fact*, the costs abide the event, as in ordinary cases.

with a new or further imparlance. An order had been made for the amendment "*without costs,*" and the Court refused to vary the terms of the order.

abatement, may be with or without payment of costs, at the discretion of the Court.

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MICHLAM *v.* BATE, M. T. 1828, K. B. 8 *B. & C.* 642.

So, after issue joined on a demurrer to a plea in abatement, the plaintiff's omission to enter the issue on record does not entitle the defendant to the costs of a judgment of non pros.

BY 4 Jac. 1, c. 3, it is enacted, that if any person shall commence any action in any Court wherein the plaintiff or defendant might have costs, in case judgment shall be given for him, and the plaintiff after appearance be nonsuited, or a verdict pass against him, then the defendant shall have his costs. Upon demurrer to a plea in abatement, the plaintiff omitted to enter the issue upon record. Judgment of non pros was signed by the defendant for not entering the issue. The defendant's attornies applied for costs of judgment of non pros, which the plaintiff refused to pay.

*Per Cur.*—As the plaintiff would not have been liable to pay the costs, if the Court, after argument, had given judgment against him, we think he ought not to be subject to costs by reason of his having omitted to enter the issue, and thereby incurred expense unnecessarily.

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## Abatement Pleas in Criminal Proceedings*.

See post, tits. *Addition—Indictment—Misnomer.*

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REX *v.* COOKE, M. T. 1824. K. B. 2 *B. & C.* 618; S. C. 4 *D. & R.* 114.

A plea that defendant is a peer, is triable by the record, and must state the mode in which he derived his title.

THE defendant pleaded in abatement to an indictment that he is a peer, and ought to be styled by his title. On motion to quash the plea, it was contended, that the objection to the plea, that the patent and pedigree were not set out, may be cause for demurrer, but were no ground for quashing the plea; for defendant would thereby be deprived of the opportunity of discussing the validity of his plea upon a writ of error.

And of that opinion were the Court.

* A plea in abatement, in criminal as in civil cases, must be pleaded before any plea in bar, (2 Hale, 175; Fost. 167); and be put in upon the arraignment of the accused. (2 Hale, 175).

These pleas require the greatest accuracy and precision in framing them: they should be certain to every intent, and should point out the objection intended to be relied on, so that it may be readily controverted or avoided in another prosecution. In a prosecution for felony, the defendant may plead over to the offence, together with a plea in abatement; and if he omit to do so, the Court will order it to be done, and insert it at the bottom of the parchment: (*Dean's case*, 1 Leach, 478; 2 Leach, 712, n. *a*; 2 Hale, 238): but the omission is no ground of demurrer, as the defendant may plead over to the felony after the plea in abatement has been determined against him, and this is *in favorem vitæ*. (Id. Carth. 55). In misdemeanors the defendant is not allowed to plead over together with or after plea in abatement. (See *Rex* v. *Gibson*, 8 East, 107). The plea may be pleaded by attorney as well as in person. (*Rex* v. *Westby*, 10 East, 85, n.; 2 Hawk. c. 34, s. 3, S. C.).

It has been decided that the plea may be put in ore tenus; (2 Leach, 535; 1 Leach, 476); the present practice, however, does not accord with this, it being the usual, and safest course, to put it in in writing, engrossed on parchment or paper. It should be signed by counsel. (See Cro. Car. c. 21; 1 Ch. C. L. 448).

By the 4 Anne, c. 16, s. 11, it is provided, "that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit

**Abbreviation.** See also tits. *Attorney—Capias, Writ of—Initials—Summons, Writ of*.*

**Abduction†.** See also tit. *Childstealing.*

**Abettors.** See tit. *Indictment.*

**Abeyance.** (1 *Peters. Ab.* 89).

prove the truth thereof, or shew some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true." This provision, it seems, applies to criminal proceedings. (*Rex* v. *Grainger*, 3 Burr. 1617). It is at all events necessary to add the affidavit to a plea to a prosecution in the crown office. (Id. *Rex* v. *Jones*, 2 Show. 1161).

Instead of replying, the prosecutor might, if the grand jury be still sitting, alter the indictment, by substituting the name by which the defendant has pleaded for the name in the indictment, and have it preferred again and found, and the defendant again arraigned upon it; in which case he would be estopped by his plea in abatement from again pleading a misnomer. This was formerly the practice, but a more effectual remedy is provided by the stat. 7 G. 4, c. 64, s. 19, which provides, "that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the Court shall be satisfied, by affidavit or otherwise, of the truth of such plea; but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and call upon the party to plead thereto and proceed as if no such dilatory plea had been pleaded."

The judgment for the Queen upon a plea in abatement in misdemeanors is final; in treason and felony, that the defendant do answer over. (*Rex* v. *Gibson*, 8 East, 107). The judgment for the defendant was, formerly, that the indictment might be quashed; but now, the indictment may be *amended*, and the defendant called to plead thereto as if no such dilatory plea had been pleaded. (*Rex* v. *Gibson*, 8 East, 110; 1 Leach, 478; 2 Hale, 239). In both cases, on a judgment on demurrer, the judgment is, that the defendant do answer over. (Trem. P. C. 189, 198; *Rex* v. *Hon. R. Johnson*, 6 East, 583, 602): *Eichorn* v. *Le Maître*, 2 Wils. 368; 1 Ch. C. L. 451). And the reason for this latter doctrine is, that every man shall not be presumed to know matter of law, which he leaves to the judgment of the Court, but he is presumed to know whether his plea be true or false in matter of fact.

* The 12th sect. 3 & 4 W. 4, c. 42, provides, "that in actions on bills of exchange, promissory notes, or other written instruments, parties designated by initial letters or contractions of the Christian name may be proceeded against by the same initial letters or contractions."

† The 9 Geo. 4, c. 31, s. 19, enacts, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

The 20th sect. provides, "that the unlawfully taking, or causing to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be a misdemeanor."

The 1st sect. of the act repeals the 3 Hen. 7, c. 2; 39 Eliz. c. 9; and 3 Edw. 1, cc. 3, 4, 5; and 10 Geo. 4, c. 115; as also so much of 6 Rich. 1, c. 6, as relates to ravishers and to women ravished.

## Abiding by Plea *. (1 *Peters. Ab.* 91).

## Abode, Place of. See tits. *Action, Notice of—Affidavit—Bail—Capias, Writ of—Summons, Writ of.*

# Abortion.

REX *v.* SCUDDER, 1828. 3 *C. & P.* 605; S. C. 1 *M. C. C.* 216; Semb. overruling REX *v.* GOLDSMITH, 3 *Campb.* 76; 1 *Peters. Ab.* 95.

To have constituted an offence within 43 Geo. 3, c. 58, s. 2, the woman must have been with child †.

ON an indictment for administering a drug to A. B., a female, to procure abortion, it appeared that the prisoner had had connexion with A. B., and had given her a drug, and told her that it "was to kill the little one." It also appeared that A. B. had never been with child at all. The jury found the prisoner guilty: but, on the point being reserved, the judges held the conviction wrong; on the ground, that, to constitute the offence, the woman must be *with child.*

REX *v.* CADMAN, *Carr. Supp.* 237; S. C. 1 *M. C. C.* 114—S. P. REX *v.* HARLEY, 4 *C. & P.* 369.

A portion of the poison must be taken into the stomach.

THIS was an indictment for administering poison to E. D. with intent to murder her. The proof was, that the prisoner gave her a bit of cake, which contained arsenic and sulphate of copper. She put this into her mouth and spit it out, but did not swallow any part. This was held to be not sufficient; and the twelve judges decided, that it was not an administering unless the poison was taken into the stomach.

*See Arch. Crim. Law,* 336, *4th Ed.:* 1 *Chit. Burn,* 11.

* Formerly, if defendant demurred without cause, or pleaded a sham plea, an order or rule was obtained that he abide by his plea; but now, by R. H. T., 2 W. 4, r. 46, "the defendant shall not be at liberty to waive his plea without leave of the Court or a judge;" hence, a rule or order to abide is no longer necessary.

† The stat. 43 Geo. 3, c. 58, was wholly repealed by the stat. 9 Geo. 4, c. 31, which in the 10th section enacted, that if any person "with intent to procure the miscarriage of any woman, not being or not being proved to be then quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony." And now by the 1 Vict. c. 85, s. 6, the 9 Geo. 4, c. 31 is repealed, and the recent statute provides, "that, whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poisonous or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with like intent, shall be guilty of felony; punishable by transportation for life, or for not less than fifteen years, or imprisonment for not more than three years." This act, it will be seen, abolishes all distinction as to whether the administering be with the consent of the woman or not, or whether she be actually pregnant or not, but the article administered must be a poisonous or noxious thing.

REX *v.* COE, 1834. N. P. 6 *C. & P.* 403.

The noxious or innocent character of the article administered is held not to be the question, the intent of the party being the legal test of guilt*.

INDICTMENT, on 9 Geo. 4, c. 31, s. 13, for administering saffron, with intent, &c. Counsel endeavoured to shew, that the article was innoxious; but *Vaughan*, B., held, that such a course of examination was unavailing, as the INTENT was the criterion.

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**Absconding.** See tits. *Apprentice—Bankrupt—Charitable Institutions.*

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**Absence Abroad.** See tits. *Distringas—Limitations, Stat. of—Outlawry.*

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**Absence of Witness.** See *Trial.*

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**Absenting himself.** See tit. *Bankrupt.*

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**Absolute, or in Chief, or de bene esse.** See tit. *Declaration.*

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## Abstract of Pleas.

REG. GEN. T. T. 1 W. 4, 1831, r. 13.

Leave to plead several matters to be obtained on summons on producing abstract of intended pleas.

No rule to shew cause or motion shall be required in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. Provided that no summons or order shall be necessary in the following cases: that is to say, where the plea of non assumpsit, or nunquam indebitatus, or non detinet, either with or without a plea of tender as to a part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the plea, or a draft or copy thereof.

* But see ante, note, 1 Vict. c. 85, s. 6.

## Abstract of Title*.

SEATON *v.* BOOTH, H. T. 1836. K. B. 4 *Ad. & E.* 528.

A purchaser being let into possession under an arrangement to pay a per centage on the purchase-money, does not waive his right to an abstract.

A., B., and C., having separate interests in lands, by arrangement amongst themselves, employed an agent to put them up to sale, which was done in separate lots, and the defendant became the purchaser, subject to the conditions of sale; by one of which the vendors were to deliver an abstract, and the conveyance be executed, and the purchase-money be paid on a certain day, from which time the purchaser was to have possession; and that if he was let in before payment he was to be deemed tenant at will, and pay four per cent. "as for rent." The defendant knew of the private arrangement, and was let into possession, but no abstract was ever delivered or interest paid. The Court held, that no implied contract to waive the delivery of the abstract could be raised from the mere circumstance of the defendant being let into possession.

## Abusing Female Children. See tits. *Carnal Knowledge of Children—Rape.*

## Abuttals†.

REG. GEN. H. T. 4 W. 4, r. 5.

Abuttals must be stated in declaration in trespass quare clausum fregit.

IN actions of trespass quare clausum fregit, the close or place in which, &c., must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially.

*See* 2 *Dowl. P. C.* 173.

* An abstract, in addition to disclosing the vendor's title, ought to mention every incumbrance affecting the estate; and should, therefore, contain an account of every judgment. (*Richards* v. *Barton*, 1 Esp. 267; also 4 Taunt. 334). In equity the abstract is considered as complete, whenever it appears that, upon the fulfilment of certain acts, the legal and equitable estate will be the purchaser's, although it may be long before the title can be perfected.

When, under a sale conditioned to be void if the vendor cannot make a good title, an abstract of it is delivered to the vendee, the latter may maintain trover for it against the vendor. When the contract is determined, the abstract becomes the property of the vendor, but an opinion written thereon by the seller's consent continues the property of the purchaser. (*Roberts* v. *Wyatt*, 2 Taunt. 267).

† Abuttals are not, in general, to be construed strictly; but in their strict sense they include the idea of contiguity, though not necessarily through the entire length of the abuttals; therefore, where land was granted and described as abutting on a certain road, but was separated from the road in a certain part by a small strip of the grantor's land, it was held, that the grantor was concluded from preventing the grantee from coming out into the road over this slip of land. In such a case, however, the deed describing the abuttals may be negatived by contrary evidence. (*Roberts* v. *Karr*, 1 Taunt. 495. See *Rex* v. *Mellor*, 2 D. P. C. 173).

LEMPRIERE *v.* HUMPHREY, E. T. 1835. K. B. 3 *A. & E.* 181; S. C. 4 *N. & M.* 638.

Where the *locus in quo* is described by abuttals, no objection to them can be taken under a plea of justification.

To an action of trespass in which the declaration describes the locus in quo by *abuttals*,

The defendant pleaded only a justification in respect of his seisin of the locus in quo, which he averred to be parcel of the manor of H., and to have been demised to him by copy of court-roll. The plaintiff denied that it was parcel, &c. On the trial the plaintiff applied his evidence to a triangular piece of land not contiguous on all sides to the places mentioned in the abuttals, but situated within their limits.

It was contended, the general issue not being pleaded, no objection to the abuttals could be received.

And *Per Cur.*—We think, that, under the new rules, the defendant, if he does not demur, is bound by the description he has adopted, and with respect to which he feels certainty sufficient to enable him to plead a justification of the alleged trespass.

## Accedas ad Curiam.

See also tit. *Replevin.*

BATES *v.* TURNER, H. T. 1825. C. P. 10 *Moore*, 32.

The writ does not lie from a Court of Requests to the superior courts of Westminster.

ON a rule to shew cause, why proceedings taken by the defendant should not be set aside, with costs, on an affidavit of the plaintiff, which stated, that he commenced an action against the defendant in the Court of Requests, for the manor of Sheffield and Ecclesshall, which had jurisdiction over debts not exceeding 5*l.*; that the defendant was summoned to appear there on the 29th, on which day the plaintiff withdrew his plaint; after which the defendant sued out an accedas ad curiam, by which the proceedings were removed to this court.

*Per Cur.*—We have before decided, that a writ of false judgment would not lie to this court from a Court of Requests, and the same rule will apply to a writ of this description.

**Acceptance.** See tits. *Accord and Satisfaction—Bills and Notes—Executors and Administrators—Frauds, Stat. of—Landlord and Tenant—Rent—Surrender—Vendors and Purchasers.*

**Acceptor.** See tit. *Bills and Notes.*

**Access.** See tits. *Bastard—Husband and Wife.*

**Accessary.** See tit. *Principal and Accessary.*

# Accident*.

See also tits. *Carriers—Driving—Negligence, Action for—Ship and Shipping.*

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WILLIAMS *v.* HOLLAND, E. T. 1833. C. P. 6 *C. & P.* 23; S. C. 3 *M. & Scott,* 540; S. C. 10 *Bing.* 112.

An injury occasioned by inevitable accident, or mutual negligence, confers no right of suit;

IN an action on the case for driving a chaise against the plaintiff's cart and overturning it, and injuring the plaintiff's son, and servant who was driving it, one of the witnesses attributed the injury to the carelessness of the defendant.

*Bosanquet,* J., in addressing the jury, stated the rule to be, that if the injury was occasioned, partly by the negligence of the defendant and partly by the negligence of the plaintiff, a verdict ought not to be given for the latter.

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SIORDET *v.* HALE, E. T. 1828. C. P. 4 *Bing.* 607.

but the least degree of neglect will suffice to deprive a defendant of the defence, that the injury was merely accidental.

ACTION on the case for negligence. It appeared, that a person in the defendant's employ had filled the boiler of a steam-engine over night, in winter, and that the water had frozen in the pipes, which bursting, the water escaped into the hold, and occasioned damage. Held, that the jury were warranted in finding the damage had been occasioned by negligence and not by the act of God.

*See S. P. Wakeman* v. *Robinson,* 8 *Moore,* 63; *S.C.* 1 *Bing.* 213; 1 *Peters. Ab.* 1.

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WOOLLEY *v.* SCOVELL, M. T. 1828. K. B. 3 *M. & R.* 105.

Nor, when the original act is wrongful, will giving the plaintiff warning absolve defendant from responsibility.

THE defendant kept a warehouse with a window opening into a yard, and in order to save time directed his servants to throw the wool out of the window of the warehouse. Before it was dropped from the window, the defendant's servants called out to warn passengers. The plaintiff, who happened to be in the yard, looked up and saw the wool as it was thrust out of the window; he then ran across the yard, thinking, as he afterwards said, that he should have time to escape. The wool, however, fell upon him, and he sustained considerable injury.

The jury found for the plaintiff. And the Court held the action maintainable; as the first fault was the throwing of the wool from the window, instead of lowering it by the usual mode, by a crane.

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GOODMAN *v.* TAYLOR, M. T. 1832. N. P. 5 *C. & P.* 410.

Injury occasioned by the incautious act of a third party

IN an action for an injury arising out of alleged negligence in driving, it was proved, on the part of the defendant, that his wife was holding a pony by the bridle in a public thoroughfare, when a

* Accidental involuntary trespass may be justified. (*Beckwith* v. *Shordike,* 4 Burr. 2092). And if, in the prosecution of a lawful act, an accident, which is purely so, occurs, no action can be supported for an injury arising therefrom; hence, where chattels are inevitably driven against each other by the violence of the wind and rolling of the sea, (*Davis* v. *Saunders,* 2 Chit. R. 639), no action can be sustained; nor does it lie where the injury is occasioned by the want of ordinary care on the part of the plaintiff, (*Butterfield* v. *Forrester,* 11 East, 60); or ordinary skill. (*Flower* v. *Adams,* 2 Taunt. 314). And see 2 D. & R. 256; 3 C. & P. 554; 5 Id. 410, 375; 1 Cr. & M. 21; and cases, supra.

will not deprive the defendant of the defence of inevitable accident.

showman came by and frightened the animal, who ran off with the chaise.

Lord *Denman*, C. J., said, if credence be given to the evidence, he thought the jury would be disposed to consider the event as an inevitable accident; one which, at least, the defendant could not prevent.

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COTTERILL *v.* STARKEY, H. T. 1839. N. P. 8 *C. & P.* 691.

In trespass, the defence of inevitable accident must be pleaded*.

IN an action of trespass for negligently driving, whereby the plaintiff's wife was injured, the defendant pleaded first, not guilty; and second, a plea, which stated, in substance, that the accident arose by and through the mere negligent, careless, and improper conduct of the plaintiff.

And *per Patteson*, J.—This is an action of trespass; and if, in trespass, a defendant means to say that the matter did not arise from his fault, that must be stated in a special plea.

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## Accommodation. See tit. *Bills of Exchange.*

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## Accomplice†. (1 *Peters. Ab.* 112).

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* But not in an action on the case; *Gough* v. *Bryan*, 2 M. & W. 770; S. C. 5 D. P. C. 766; *Bridge* v. *The Grand Junction Company*, 3 M. & W. 244; 6 D. P. C. 340; because such plea negatives the charge of the defendant being guilty of negligence, and amounts to not guilty.

† An accomplice is a competent witness previous to his conviction of a crime, which takes away competency in all cases, whether of treason, (1 Hale, P. C. 303), felony, (1 Leach, C. 135), or mere misdemeanor. (2 Hawk. P. C. 46). The doctrine is founded on obvious grounds of policy, (1 Hale, P. C. 303), and perhaps of necessity. It is perfectly settled, that no promise of pardon, whether it be absolute or conditional, will render an accomplice incompetent. (1 Hale, P. C. 304). In some instances, accomplices are strictly entitled to pardon. Such was formerly the case with approvers, upon conviction of their associates. The practice of admitting an approver to appeal, (a matter purely within the discretion of the Court), had become obsolete in the time of Sir Matthew Hale, (2 Hale, P. C. 226), who observed, that more mischief had arisen to good men from these approvements, upon false accusations by desperate villains, than benefit to the public by the discovery and conviction of real offenders. Since their discontinuance, and before their final abolition, the doctrine of approvements had become more a matter of curiosity than use. Although an approver was sworn to the truth of his appeal, yet, it seems, that he was not a competent witness upon the trial. For this proceeding have been substituted the enactments of general statutes, and the reasonable and equitable practice of admitting an accomplice to give evidence under a conditional promise of pardon, in case he make a fair and impartial disclosure.

These statutes, in cases of coining, robbery, burglary, housebreaking, and horse stealing, (4 Will. & M. c. 8, s. 7), enact, that, if an offender, being out of prison, shall discover two or more persons who have committed the like offences, he shall be entitled to a pardon of the offences respectively specified in those statutes.

These statutes, and also others which protect an offending party who discovers another offender, seem to make the latter a competent witness by legislative declaration; for, if he were not to be a competent witness, the provisions of the statutes would be almost nugatory and useless; it would be holding out an inducement to offenders to make a discovery, and, when made, they would be precluded from the benefit of it. (4 East, 180). The present practice is, where accomplices make a full and fair confession of the whole truth, and are, in consequence, admitted to give evidence for the Crown, if they afterwards give their

testimony fairly and openly, although they are not of right entitled to pardon, the usage of the Court is, to stay the prosecution against them, and they have an equitable title to a recommendation to the King's mercy. (Leach, C. L. 140).

No accomplice can be examined against his consent; for he is not bound to criminate himself. Where he is willing to give evidence, it seems to be the more proper course not to include him in the indictment. (1 Hale, P. C. 305). The practice is, (where the accomplice is in custody), for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential; the admission of the party as a witness amounts to a promise of recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime.

Where an accomplice has been joined in the indictment, and, before the case comes on, it appears his evidence will be required, he may, on the application of the counsel for the prosecution, be acquitted, for the purpose of being called as a witness. (*Rex* v. *Rowland*, 1 R. & M., N. P. C. 401). But an accomplice will not be admitted in the usual way by the counsel for the prosecution, where he is charged with any other felony than that on the trial of which he is to be a witness. (*Anon.* 1826, N. P., 2 C. & P. 411). It is for the jury to say whether they will act upon the evidence of an accomplice alone or not. (*Rex* v. *Hastings*, 1825, N. P. 7 C. & P. 152; S. P. *Rex* v. *Wilkes*, 1836, N. P., 7 C. & P. 272). But they cannot act upon the mere testimony of the wife, who is an accomplice, against her husband. (*Rex* v. *Noel*, 1833, N. P., 7 C. & P. 168). An accomplice need not be confirmed in every material point to authorize a conviction.—*Hullock*, B. (*Rex* v. *Barnard*, 1823, N. P., 1 C. & P. 87), though the confirmation must be as to some material fact.—*Patteson*, J. (*Rex* v. *Addis*, 1824, N. P., 6 C. & P. 388; S. P. *Rex* v. *Noakes*, 1832, N. P., 5 C. & P. 326); that the robbery be proved to have been effected in the mode stated by the accomplice, is not a material fact—*Williams*, J.; (*Rex* v. *Webb*, 1824, N. P., 4 C. & P. 564; the confirmation ought also to be with respect to some matter which connects the prisoner and accomplice with the transaction. (*Regina* v. *Dyke*, 1838, N. P., 8 C. & P. 261). As shewing that the prisoner and accomplice were together under circumstances likely to prove they acted in concert. (*Reg.* v. *Farler*, 1837, N. P., 8 C. & P. 106). But the accomplice pointing out that mutton (in a case of sheep stealing) was to be found in the prisoner's house, which corresponded in size with the sheep stolen, is not sufficient. (*Reg.* v. *Birkett*, 1839, N. P., 8 C. & P. 732).

If A. and B. be indicted, and A. plead, an accomplice's evidence, confirmed as to A., cannot be extended so as to convict B. (*Rex* v. *Moore*, 1836, N. P., 7 C. & P. 270; S. P. *Rex* v. *Damker*, 3 Stark. N. P. 34. See, also, *Rex* v. *Rudd*, Cowp. 331). And A., a married woman, who had consented to an unnatural offence by her husband, is not such an accomplice, as her evidence can be received unconfirmed. (*Reg.* v. *Jellyman*, 1838, N. P., 8 C. & P. 604). But where the prisoner was charged in different indictments with setting fire to three ricks, and the last offence was first tried; held, that the accomplice might state as to the whole, the three constituting part of the same transaction. *Per Gurney*, B. (*Rex* v. *Long*, 1833, 6 C. & P. 179). There is a great distinction as to the circumstances of the offence, and the individual charged with it; the former establishes that the accomplice was present, and the latter that the prisoner was connected with it. (*Rex* v. *Wilkes*, 1836, N. P., 7 C. & P. 272). On an indictment against principal and accessary, an accomplice's evidence was confirmed as to the former, but not as to the latter. *Littledale*, J., directed an acquittal. (*Rex* v. *Wells*, 1829, N. P., 1 M. & M. 326). If the deposition taken before the magistrate does not agree with the accomplice's evidence at the trial, the judge will allow it to be shewn, but will not permit it to be read. (1838, N. P., *Reg.* v. *Heardenne*, 8 C. & P. 200). An accomplice should be committed, and not bailed, by the justices who hear the offence. (*Rex* v. *Heardenne*, 1836, N. P., 7 C. & P. 497).

# Accord and Satisfaction*.

See tits. *Arbitration—Composition with Creditors—Payment.*

I. WHEN VALID AND WHEN NOT, p. 26.
II. EFFECT OF, p. 30.
III. HOW, AND IN WHAT ACTIONS, PLEADABLE, p. 31.
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## I. WHEN VALID AND WHEN NOT.

CARTWRIGHT *v.* COOKE, T. T. 1832. K. B. 3 *B. & Adol.* 701.

A *third* party being bound by an agreement is a sufficient consideration to make it operate as an available accord†.

AN annuity bond was executed by two brothers; one as principal, the other as surety. By agreement afterwards between them and a third brother, for the settlement of their several claims and debts, and for the apportionment of property, to meet the latter the annuity bond was included. The surety in that bond was afterwards compelled to pay, and his representative brought an action against their principal to be reimbursed the amount. Held, that the agreement was an accord in respect of the annuity bond; and that, as third parties were bound by that agreement, the surety was also bound, and that the action could not be maintained.

* These expressions technically import an agreement to accept and the receipt of some equivalent for an antecedent vested right. The accord is the contract; the satisfaction, the substituted equivalent. The former must not be of an inferior nature to the contract to which it relates; hence, a deed cannot be revoked or discharged by parol, or even by writing not under seal; but an executory agreement in writing, (not a sealed instrument), may, before breach, be discharged by subsequent parol agreement; (*Lord Milton* v. *Edgeworth*, 6 B. P. C. 587); but, after breach, even a simple contract cannot be discharged, unless by deed, or by an accord and satisfaction. (B. N. P. 152; *Willoughby* v. *Backhouse*, 2 B. & C. 824). When the instrument is in writing, even within the provisions of the Statute of Frauds, it may be discharged by a subsequent parol agreement before breach. (1 Phil. Ev. 545; and see *Cuff* v. *Penn*, 1 M. & S. 21). The defendant must prove the accord executed according to its terms; therefore, when there is an agreement to pay money in satisfaction, it is not enough to shew that the party has always been ready to pay it, or a tender and refusal. (*Peyton's case*, 9 Rep. 79 b: but see *Bradley* v. *Gregory*, 2 Camp. 385). So, though an accord to perform a thing at a future period is good, yet it must be proved to be executed before commencement of the action. (1 Rol. Ab. 129, l. 17). See *Sells* v. *Hoare*, 1 Bing. 401; *Gode* v. *Cheeseman*, 2 B. & Ad. 328; *Thomas* v. *Heathorn*, 2 B. & C. 477; 1 Peters. Abr. 120. But an accord by deed, though without satisfaction, may operate as a conclusive extinguishment of a right. (*Rowntree* v. *Jacob*, 2 Taunt. 141). So may a rule of Court; (*Cameron* v. *Reynolds*, Cowp. 406); but a judgment against a co-contractor is no extinguishment, unless realized by execution, and then only to the amount received. (*Ayney* v. *Davenport*, 2 N. R. 474). Taking a bond, or bill, or note, is not a waiver of the right to distrain. (*Palfrey* v. *Baker*, H. T. 1837, Ex. 3 Price, 572). Nor is the right of distress taken away by an agreement to take interest. (*Skerry* v. *Preston*, M. T. 1813, K. B. 2 Chit. Rep. 245).

† If A. pay for B. a smaller sum in satisfaction of a greater, it is a bar to the plaintiff's claim; because, by suing B., he commits a fraud on A., whom he in-

WELBY *v.* DRAKE, M. T. 1825. N. P. 1 *C. & P.* 557.

ACTION on bill of exchange against defendant as drawer. It appeared that plaintiff had agreed with a third party, that if he would advance part of the money for the defendant he would take it in discharge of the whole debt; and such third party advanced the sum. *Tenterden*, C. J., held the partial payment a bar; because, by suing the defendant, he commits a fraud on the party advancing the money.

The acceptance of a less sum than the original debt from a third party is binding;

*See Edgecombe* v. *Rodd*, 5 *East*, 292; *S. C.* 1 *Smith*, 515.

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DOWN *v.* HATCHER, E. T. 1839. Q. B. 2 *P. & D.* 292.

THIS was an action against an executrix for a cause of action due from her testator; the declaration admitted a part payment, and assigned a breach as to the residue, to wit, the sum of 500*l.*; to which the defendant pleaded, that, after the making of the promise therein mentioned, and before the commencement of the suit, to wit, on &c., the defendant as executrix, &c., paid to the plaintiff 6*l.* 10*s.*, in full satisfaction and discharge of the said residue, &c., and of all causes of action in respect thereof, and the plaintiff then accepted the said 6*l.* 10*s.*, in such full satisfaction and discharge as aforesaid.

but not from the party himself; and a plea so framed is bad, even after verdict.

After verdict, application was made for judgment non obstante veredicto, on the ground, that a plea of payment of a smaller sum in satisfaction cannot be a bar to an action for a larger. And of that opinion were the Court, who decided that the plea was bad, and not cured by verdict.

*See Fitch* v. *Sutton*, 5 *East*, 140; *Reay* v. *Richardson*, 2 *C., M., & R.* 422.

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THURMAN *v.* WILDE, H. T. 1840. Q. B. 3 *P. & D.* 289.

To an action of trespass for breaking and entering the plaintiff's close, the defendant pleaded that he acted as servant of A. B.; that he delivered up possession of the close to A. B.; and that A. B. afterwards, and with the *consent* of the defendant, made satisfaction to the plaintiff, and the plaintiff accepted and received the same. Replication traversing the *consent*.

It seems satisfaction from a stranger cannot be pleaded as an accord, unless he be a joint wrong doer.

On demurrer the Court held, they need not decide whether accord and satisfaction by a stranger could be pleaded; because, it appeared from the plea, that A. B. was a co-trespasser, so as to make a satisfaction which might enure to the benefit of the defendant, and therefore the traverse of his consent in the replication was immaterial and bad on demurrer.

*See* 5 *East*, 294; 3 *Taunt.* 117.

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STRACY *v.* THE BANK OF ENGLAND, T. T. 1830. C. P. 6 *Bing.* 754; S. C. 4 *M. & P.* 639.

THE plaintiffs were possessed of certain stock, which was sold and transferred in the Bank books, under a forged power of attor-

An agreement to do an act before the de-

duced to advance his money on the faith of such advance being a discharge of the debtor. (*Welby* v. *Drake*, supra). See *Edgecombe* v. *Rodd*, 5 East, 294; S. C. 1 Smith, 515.

fendant shall be called upon to perform one of doubtful legal obligation suspends the paintiff's right of action.

ney. The plaintiffs entered into an agreement with the Bank to tender a proof of the sum thus surreptitiously obtained, under a commission of bankruptcy issued against the firm, of which the party who forged the power of attorney was a member, in consideration of the Bank agreeing without litigation to replace the stock. In an action on the case against the Bank for not transferring the stock,

*Per Cur.*—It is urged by the plaintiffs, that, if this is an agreement on their part, it may furnish materials for an action by the Bank to recover damages, but that it is no bar to the present action. The agreement is, however, not set up by the defendant as a perpetual bar; it is merely insisted on as an impediment to the present maintenance of the suit. It is used as an instrument, by which the plaintiffs have for a good consideration restrained themselves from suing, not perpetually, but only until they have first done a particular act. And, as it is not immaterial to observe, that the very circumstance of bringing this action, if the plaintiffs were to succeed in it, would have the effect of making it impracticable for them to keep their agreement so entered into with the defendants; for the plaintiffs cannot recover in this proceeding except by establishing that they are still holders of the stock which has been sold; and if they continue such holders they cannot make proof of any debt under the commission.—*Judgment for the defendants.*

*See Longridge* v. *Dorville*, 5 *B. & A.* 117.

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SIMON *v.* LLOYD, E. T. 1835. Ex. 2 *C. M. & R.* 187.

So, taking an acceptance, even with no drawer's name, suspends the right of the creditor to sue until the bill becomes due and is dishonoured;

ASSUMPSIT for gooods, money lent, and account stated. Plea, that defendant signed a bill for 20*l.* in blank as to the drawer's name, but payable to order, at two months, which he accepted in part as satisfaction for the debt, and which acceptance was not yet due. Replication, that it remained in the plaintiff's hands unnegotiated and not filled up, and unpaid. On demurrer,

*Per Cur.*—There is a promise to pay the bill which the defendant cannot get rid of, with an irrevocable authority to put the name of a drawer to it, that is a valuable consideration; or, it may be said, that there is an agreement by both parties, that the plaintiff's right to sue should be suspended; it is in effect an agreement not to sue for a certain time, in consideration of an authority to use the defendant's name for a certain amount during the period of two months.

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PLIMLEY *v.* WESTLEY, M. T. 1835. C. P. 2 *Bing. N. S.* 249, 2 *Scott*, 423.

but the mere taking a bill or note has not this effect, unless payable to "order."

A CASE submitted for the opinion of the Court disclosed, that the defendant indorsed a promissory note, of which he was the holder, to the plaintiff, in discharge of a debt for goods sold and delivered, but the direction to pay the note did not contain the words, "or order." It was presented for payment to the makers nine days after it became due, and was dishonoured.

The Court were of opinion that, as the words, "or order," were omitted, the plaintiffs had no security of which they could avail themselves, and were remitted to their original right, and entitled to recover on the counts on the original consideration of the debt, although no

notice had been given to the defendant of the note being dishonoured.

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BAYLEY *v.* HOMAN, T. T. 1837. C. P. 5 *Bing. N. S.* 915; S. C. 5 *Scott*, 94.

An *unexecuted* accord cannot be sustained; and if a substituted agreement be relied on as a discharge of a prior obligation, it must be founded on a good consideration;

ACTION for breach of covenant in not repairing and leaving in repair. Defendant pleaded, that, after the expiration of the term, and before commencement of the suit, and whilst the premises were ruinous, prostrate, &c., an agreement had taken place between the parties, that in consideration that the defendant, at the request of the plaintiff, had become and then was the occupier of the premises at a certain rent, and had also, at the request of the said plaintiff, promised the plaintiff to repair and amend the said premises on or before a certain day, he the said plaintiff would forbear and give time to the defendant until the said day for the due reparation, &c., without in the meantime commencing or prosecuting any action in respect of the breaches of covenant; and in case the said tenement should be so well repaired upon the said day, he the plaintiff would relinquish and forego all claim upon him the defendant. The plea then alleged, that though the defendant still and during the time continued tenant of the premises, and was ready to repair, so that the premises should be in a good state by and on the said day, whereof the plaintiff had notice, yet the plaintiff wrongfully commenced his suit before the said day.

On a motion for judgment non obstante, the Court held, that, taking the plea most favourably for the defendant, it was a plea of an accord, executory only and not executed, contrary to the rule in Rolle's Abr. 129, Accord, pl. 11, 12, 13. Again, in *Peyton's case*, 9 Rep. 70, where it is broadly stated by the Court, that in an accord, if the thing is to be performed at a day to come, an averment of tender and refusal is not sufficient without actual satisfaction and acceptance. In *Allen* v. *Harris*, 1 Ld. Raym. 122, the Court say, the books are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the cases, but if it had been a new point it had been worthy of consideration.

The plea was also holden bad, because there was no good consideration, either for the defendant's promise to the plaintiff to repair the premises before a certain day, or for the plaintiff's engagement to the defendant to forbear to sue until that day.

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TAYLOR *v.* HILARY, H. T. 1835. Ex. 1 *C., M., & R.* 741; S. C. 5 *Tyrw.* 373; 3 *D. P. C.* 461.

and the latter should not be pleaded as an accord and satisfaction, but as an accepted and substituted contract.

To an action on a guarantee, in consideration that the plaintiff would supply A. B. with goods, the defendant undertook to pay, &c.; the defendant pleaded, that before breach it was agreed between the plaintiff and the defendant, that the plaintiff should supply goods to A. B., and that they should be paid for at the end of three months by a bill at four months, to be accepted by the defendant, which agreement the plaintiff before breach accepted in discharge of the former agreement, and released the defendant from the performance thereof.

On demurrer, the Court said, the agreement stated in the plea is a substituted contract, and is an answer to an action upon the for-

mer. The plea is not a plea of accord and satisfaction, but of a substituted contract.

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ALLIES *v.* PROBYN, E. T. 1835. Ex. 2 *C., M., & R.* 408; S. C. 4 *D. P. C.* 153.—S. P. CRISP *v.* GRIFFITHS, Ex. 2 *C., M., & R.* 159—BAYLEY *v.* HOMAN, C. P. 3 *Bing. N. S.* 915; S. C. 3 *Scott,* 384—EDWARDS *v.* CHAPMAN, 3 *C., M., & R.* 231; S. C. 4 *D. P. C.* 732—COLLINGBOURNE *v.* MANTELL, T. T. 1839. Ex. 5 *M. & W.* 289.

Accord without satisfaction is no answer to a legal demand.

DECLARATION in assumpsit by plaintiff, as drawer of a bill of exchange, against defendant as acceptor, and for goods sold; plea, that, after the cause of action arose, as to part, in consideration that the defendant would execute a mortgage when called on so to do, the amount to carry interest and be payable by instalments, the plaintiff would take no proceedings as to that sum unless default were made in payment of the instalments, and averring, that the defendant was always willing to execute such mortgage, but was never called upon to do so. The Court held the plea bad on demurrer, as being a mere accord without satisfaction.

*See Siboni* v. *Kirkman,* 1 *M. & W.* 418.

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FIELD *v.* ROBINS, E. T. 1838. K. B. 3 *N. & P.* 226.

To be a bar it must appear to be in satisfaction of the entire demand, both then existing and prospectively.

THE plaintiffs in an action against the co-obligor of the defendant, on the joint and several indemnity bond of both of them, accepted from the former 215*l.*, the damages being at that time unliquidated, and gave a receipt for that sum, stating it to be in discharge of the damages and costs in that action. The Court were of opinion, that this receipt did not shew that the plaintiffs had accepted the 215*l.* in satisfaction of their entire claim to indemnity under the bond, and therefore, that they were entitled to recover a further sum against the defendant.

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## II. EFFECT OF.

FIELD *v.* ROBINS, E. T. 1838. K. B. 3 *N. & P.* 226.

Payment by, and acceptance of, a sum of money from one of several obligors does not discharge the others;

A. B. and C. D. entered into a joint and several bond for 2000*l.* An action having been brought against A. B., the plaintiff accepted in his discharge 215*l.*, and brought an action against the defendant C. D., on the same bond, to which the defendant C. D. pleaded, that after forfeiture of the bond, and while the damages were unliquidated, and before the commencement of this suit, A. B. had paid 215*l.* to the plaintiffs in satisfaction of the breaches of the said bond, and that plaintiffs accepted the said sum in satisfaction as aforesaid.

The plaintiff had a verdict, subject to the opinion of the Court; and the Court held, that the composition in the former action was not a discharge of the whole damages on the bond, and refused to set aside the verdict.

THOMPSON *v.* PERCIVAL, H. T. 1834. K. B. 3 *N. & M.* 167.

THE defendants, A. and B., were in partnership; A. retired, and B. continued to carry on the business: the plaintiff, a creditor, being informed that A. had retired, and that he must look to B. for payment, drew a bill on B. for the amount of his claim; after the bill became due, the plaintiff gave time to B., and then brought an action against A. and B. for goods sold, &c.

*Per Cur.*—It is for the jury to say, whether it was agreed between the plaintiff and B., that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both; if it was so agreed, we think that the agreement and receipt of the bill would be a good answer on the part of A. to this demand, by way of accord and *satisfaction.*

though it may be a question for the jury to say whether it was not under the circumstances a satisfaction.

## III. HOW, AND IN WHAT ACTIONS PLEADABLE.

REG. GEN. H. T. 1834, r. 3.

THIS rule directs, that all pleas in confession and avoidance, or by way of discharge, must be pleaded; but that pleas of payment, and of accord and satisfaction, are distinct, and are to be allowed to be pleaded together.

Accord and satisfaction must be pleaded in all actions *, but such plea and a release or payment may be pleaded together; and before rule H. T. 1834, where money was paid into Court on a rule, and a subsequent action was brought, it was held that the facts should have been pleaded specially.

POWER *v.* BUTCHER, M. T. 1829. K. B. 10 *B. & C.* 329.

To an action of assumpsit, defendant pleaded, that, in Easter Term, 1827, plaintiff impleaded him for the same causes of action; and that, in Trinity Term, he pleaded the general issue to that action, and paid 5*l.* 15*s.* into Court; that the plaintiff's costs were taxed at 8*l.* 5*s.* 6*d.*, and that he agreed with him to take the sum of 5*l.* 15*s.* out of Court; that the defendant paid the costs to the plaintiff, and that he accepted and received the 5*l.* 15*s.*, together with those costs, in satisfaction and discharge of the promises mentioned in the declaration. The plaintiff replied, that he did not agree with the defendant to take and receive the 5*l.* 15*s.* out of Court, and did not accept and receive that sum, together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration. At the trial, it appeared that the plaintiff received his taxed costs, but gave notice to the defendant that he would not take the 5*l.* 15*s.* out of Court, and that he should take out a rule to discontinue the action on payment of costs. These latter costs were taxed.

*Per Cur.*—The allegation is, that the plaintiff has accepted the 5*l.* 15*s.* in discharge of the promises mentioned in the declaration. The proof is, that the sum remained in Court, and that the plaintiff had never taken it into his possession. That would not be evidence to go to the jury that it had been accepted by the plaintiff in

* Formerly, it was admissible in evidence under the plea of non assumpsit and nil debet, (1 Peters. Abr. 137); and even under not guilty, in case, (Id. 138); but never in actions of trespass: but, under the general issue, the defendant was allowed to give in evidence matter amounting to an accord and satisfaction after writ issued and before declaration. (*Worswick* v. *Beswick*, E. T. 1830, K. B. 10 B. & C. 676).

satisfaction of the promises mentioned in the declaration; but it does not rest there. The plaintiff took out a rule to discontinue the action on payment of costs, and the costs were taxed, and the defendants received the difference between those costs so taxed and the sum which they had previously received under the rule to pay money into Court. By receiving those costs, the defendants assented to the discontinuance of the action upon the terms of the rule to discontinue. It is said that the plaintiff cannot avail himself of that fact, and that he ought to have replied a waiver. But we think that is not necessary, because the satisfaction has been rendered incomplete by a subsequent fact. Taking the evidence altogether, it shews that the plaintiff never had accepted or received the 5*l.* 15*s.* in satisfaction of the promises in the declaration; and that if, in point of law, it could have been so considered, the defendant ought to have pleaded the matter specially.

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WRIGHT *v.* SKINNER, H. T. 1836. Ex. 1 *Tyrw. & G.* 277; S. C. 4 *D. P. C.* 741.

Before R. T. 1 Vict., it was held, that, under never indebted, defendant might shew agreement, on the part of the plaintiff, to receive a less sum in satisfaction, not in bar of action, but as limiting the right to verdict for nominal damages.

UNDER the plea of never was indebted to an action on an attorney's bill, the defence was, that a sum of 5*l.* had been paid to the plaintiff in full discharge. The under-sheriff told the jury, that, as there was no plea of payment, the verdict must be for the plaintiff, either for the full amount, or for nominal damages. The jury found for the plaintiff, damages one farthing. On motion for a new trial—

*Per Cur.*—It appears to have been admitted that 5*l.* had been paid, but that the plaintiff ascribed it to another account. As the under-sheriff has ruled according to the decision of the Court of Common Pleas, and Lord *Denman*, in the King's Bench, has also ruled the same at Nisi Prius, we think this *rule must be refused.*

*See Belber* v. *Bott*, 2 *M. & W.* 422, *and post, tit.* "*Payment.*" *R. T.* 1 *Vict.* 6 *D. P. C.* 649.

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THOMAS *v.* HEATHORN, M. T. 1824. K. B. 2 *B. & C.* 477; S. C. 3 *D. & R.* 647.

A plea disclosed merely the acceptance of a bill of exchange for a smaller sum than the plaintiff's original demand, and alleging that it was taken on account of the promise in the declaration, is bad, as not amounting to satisfaction*.

IN an action of assumpsit by the plaintiffs, assignees of H., a bankrupt, the declaration alleged that the defendant was indebted to the bankrupt before his bankruptcy in the sum of 1,000*l.* for goods sold, &c., which promise was stated to have been made before his bankruptcy. Plea, that, after the making of the promises, and before H. became a bankrupt, and before the commencement of the suit upon an account stated between H. and the defendant of and concerning the sum in the declaration, the defendant was found to be indebted to H. in the sum of 400*l.*, for which said sum defendant gave the bankrupt a bill of exchange, which he accepted for

* So an accord to pay a less sum than the original debt at the same or at a subsequent day, is not sustainable; (*Fitch* v. *Sutton*, 5 East, 230; S. C. 1 Smith, 415); but payment and acceptance in full satisfaction of a less sum, either *before* the day or at *another* place than that mentioned in the condition of a bond, extinguishes the debt. (Co. Lit. 212. b.; 4 Mod. 88; 5 Rep. 117).

If, after an excessive distress, the parties come to an amicable arrangement respecting a sale, it will not divest the tenant's right of action for such distress, unless that arrangement be by an agreement which may be pleaded as an accord and satisfaction. (*Sells* v. *Hoare*, 1 Bing. 401; S. C. 7 B. Mo. 36; S. C. 1 C. & P. 28).

and on account of the said several promises and undertakings in the said counts mentioned, and by reason whereof the defendant became liable to pay the bill: the plaintiff having replied over, and the defendant having demurred, it was holden to be an insufficient plea, because the mere acceptance of 400*l.* could not operate in point of law as an extinguishment of the debt of 1000*l.*

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CUXON *v.* CHADLEY, H. T. 1824. K. B. 3 *B. & C.* 591; S. C. 5 *D. & R.* 417; S. C. 1 *C. & P.* 174, 485.

TWO being separately indebted to a third, and one to the other, it was verbally agreed that the third should transfer the debt due to him from one to the account of the other, and delivered accordingly an account, in which such debt was stated.

The Court held, that, however the agreement might amount to an accord, it did not amount to a satisfaction, nor discharge the party originally liable.

for the latter is in all cases an indispensable averment.

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PARKER *v.* RAMSBOTTOM, T. T. 1824. K. B. 3 *B. & C.* 257; S. C. 5 *D. & R.* 138.

THE Court, after adverting to the facts of the case, (*abridged post, tit.* USURY), said—If you are to plead accord and satisfaction, which would be the only way in which you could get rid of the obligation which the deed produces, you must allege that they had paid the money; otherwise it would have been pleading that which we know by law cannot be pleaded—an accord without satisfaction. It would be accord without satisfaction on a simple contract, in opposition to a debt created by specialty.

Hence, in an action on a deed, a plea of accord, without shewing actual satisfaction, is of no avail.

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CORBETT *v.* SWINBURNE, T. T. 1838. K. B. 3 *N. & P.* 551; S. C. 8 *A. & E.* 673.

TO an action on a bill of exchange, the defendant pleaded, in further maintenance of the suit, as to the sum of 50*l.*, parcel &c., that, after the commencement of the suit, defendant indorsed and delivered to plaintiff a bill of exchange for 82*l.*, drawn by C. and accepted by B., in full satisfaction and discharge of defendant's promise as to 50*l.*, and of all damages by plaintiff sustained by reason of the non-performance of such promise. On motion for judgment non obstante veredicto, on the ground that the plea did not shew that the costs were satisfied.

*Per Cur.*—The plea would have been good in the present form, if the transaction had been prior to the action, and it had been pleaded in bar generally; and we cannot see any reason why it is not equally good in the same form as a bar to the further maintenance.

Accord and satisfaction, after action brought, wherefore plaintiff ought not *further* to maintain his action, is a good plea.

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DAVIS *v.* GYDE, H. T. 1835. K. B. 4 *N. & M.* 462.

IN replevin to an avowry for rent, the plaintiff pleaded, that, before the said time when &c., he made his promissory note, and promised to pay to the defendant at a certain time, which had not yet elapsed, &c., and the defendant then received the note for and on account of the said sum: on demurrer—

*Per Cur.*—There is no averment that the note was taken as accord and satisfaction, supposing that it could be so treated. The

Whether an accord and satisfaction, by taking a promissory note, can be pleaded to an avowry in replevin for rent is undecided.

plea is, therefore, insufficient. The only question which the plaintiff can put to the Court is, whether the taking of the promissory note suspends the right of distress until the note becomes due. We do not think that the matter of the plea is sufficient to shew a suspension of the right to distrain*.

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SMITH *v.* BACKWELL, H. T. 1828. C. P. 1 *M. & P.* 338.

The Court will not, though sworn to be false, set aside a plea of accord and satisfaction, if in the usual form.

To an action on a bill of exchange, the defendant pleaded—"That, after the making of the several promises and undertakings in the declaration mentioned, to wit, on &c., the defendant delivered to the plaintiff twenty pipes of port wine, in full satisfaction and discharge of the several promises, &c., in the declaration mentioned." On an application for leave to sign judgment as for want of a plea, on the affidavit of one of the plaintiffs, which stated that the plea was wholly false and untrue—

*Sed per Cur.*—We cannot interfere here, as there is no inconsistency in the plea of accord and satisfaction by delivery of wine, which is in the usual form; we cannot say that there is any fallacy, or that it is fictitious on the face of it.

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## IV. REPLICATION TO PLEAS OF.

WEBB *v.* WEATHERBY, H. T. 1835. C. P. 1 *Scott*, 477; S. C. 1 *Bing. N. S.* 502.

The replication may deny both the payment and receipt in satisfaction.

ACTION of assumpsit. The defendant pleaded that he had paid the plaintiff a certain sum, in full satisfaction and discharge of the said promise made by him, the defendant, and of the damage sustained by the plaintiff by reason of the non-performance of the said promise, and that the plaintiff accepted and received the said sum in full satisfaction and discharge of the said promise, and of the damage, &c.; to which the plaintiff replied, "That the defendant did not pay the plaintiff the said sum in full satisfaction and discharge of the said promise so made by the defendant, and of the damage sustained by the plaintiff by reason of the non-performance of the said promise; nor did the plaintiff accept and receive the said sum in full satisfaction and discharge of the said promise, and of the damage, &c., in manner and form as the defendant has in said plea alleged."

The Court held the replication good on special demurrer.

*See Brogden* v. *Marriott*, 2 *Bing. N. S.* 473; *S. C.* 2 *Scott*, 703.

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CRISP *v.* GRIFFITHS, E. T. 1835. Ex. 2 *C., M., & R.* 159; S. C. 5 *Tyrw.* 619; S. C. 3 *D. P. C.* 752—S. P. *Jones* v. *Senior*, T. T. 1838. Ex. 6 *D. P. C.* 701.

Replication de injuria cannot be supported, if the plea does not justify or excuse the

To an action on a promissory note, the defendant pleaded, that, after the making of the note, and accruing of the debt in respect thereof, the plaintiff drew a bill of exchange upon the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note. Replication, de injuria. On demurrer—

* See ante, p. 26, n., and 1 Salk. 325.

The Court held the plea bad, without deciding as to the replication. But *Parke*, B., observed: This plea does not amount merely to matter of excuse; it is more in the nature of an accord and satisfaction, though the right to sue may revive by the non-payment of the bill. The plea does not allege, that, before the breach of the defendant's promise, something occurred which took away the plaintiff's right to sue, but that, after the breach was committed, something was done which suspended that right. If several facts can be allowed to be put in issue by one replication, is this the right form? It appears to me that some better form ought to be adopted than the present.

breach, but shews matter subsequent in discharge of it.

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SARD *v.* RHODES, H. T. 1836. Ex. 1 *M. & W.* 153; S. C. 1 *Tyrw. & G.* 298; S. C. 4 *D. P. C.* 743.

ACTION by indorsee against defendant as acceptor of bill of exchange. Defendant pleaded, that, after the said bill became due, and before the commencement of this suit, to wit, on &c., G. P. (the drawer) made his promissory note for 45*l.*, and delivered the said note to the plaintiff, in full satisfaction and discharge of the said bill, and the said cause of action in said first count mentioned; and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill. Replication.—That although the plaintiff accepted the said note in full satisfaction and discharge of the said bill, yet that the note was not paid when due, and still remains in the plaintiff's hands wholly unpaid and unsatisfied.

To a plea that a promissory note was given and accepted in satisfaction of a dishonoured bill, the non-payment of the note cannot be replied.

On demurrer, the Court held, that, as the plaintiff *admitted* he had taken the note in full discharge and *satisfaction* of the unpaid bill, the debt could not be revived by the dishonour of the note. In *Kearslake* v. *Morgan*, 5 T. R. 513, it was expressly averred that the new security was taken for the balance of the debt.

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## V. EVIDENCE CONNECTED WITH.

SIBONI *v.* KIRKMAN, E. T. 1836. Ex. 1 *M. & W.* 418.

THE declaration, against executors, stated, that the plaintiff, being about to leave England, exchanged an instrument with the testator for a grand-pianoforte, which he was to purchase on his return to England; and the testator agreed to allow him 40*l.* towards the price. It was averred that he returned after the testator's decease, and demanded the pianoforte of the executors, which they refused to sell him. The defendants pleaded, that the testator did sell a pianoforte to the plaintiff for a certain price, and allowed him the value of the instrument taken in exchange. Issue thereon. At the trial it was proved that the agreement was made in 1814, and the plaintiff returned in 1834; but no evidence was given of his having been in England at any time during the interval, nor of any sale of a pianoforte. The Court held that the jury were not warranted in finding the plea, which alleged a specific contract, for the defendants.

A plea of accord and satisfaction must be proved specifically according to the facts alleged in it;

RYDER *v.* WILLETT, 1835. N. P. 7 *C. & P.* 609.

and the acceptance in satisfaction shewn.

ACTION against the defendant as the drawer of a bill. The plaintiffs were bankers; the defendant kept an account with them, and indorsed the bill to the plaintiffs; and, upon its being returned dishonoured, it was entered on the debit side of the account, which, at the time, was considerably against the drawers, and remained so at the commencement of the action. The bankers had, on former occasions, allowed the drawers to overdraw their account, but they were under no obligation to do so. *Denman*, C. J., held, that such entry was no evidence in support of a plea, that the bankers had received that sum in satisfaction of the bill *.

## VI. COSTS.

WRIGHT *v.* PIGGIN, M. T. 1828. Ex. 2 *Y. & J.* 544.

Where accord and satisfaction and not guilty were pleaded to trespass to the freehold, and for taking goods, and the jury found for the plaintiff under 40*s.*, and the judge certified: Held, that the plaintiff was entitled to costs de incremento.

To an action of trespass to the freehold and for taking goods, defendant pleaded, 1st, not guilty; 2nd, accord and satisfaction. The jury found a general verdict for the plaintiff with damages under 40*s.*, and the judge certified the amount of damages under the stat. 43 Eliz. c. 6, s. 2. On a rule to show cause why the plaintiff should not have his costs, notwithstanding the certificate—

*Per Cur.*—It is a general rule, that, wherever a defendant, in an action of trespass quare clausum fregit, pleads a special plea, the issue joined upon which is found for the plaintiff, he, the plaintiff, shall have full costs, although the damages may be under 40*s.*, and the judge shall not have certified that the title came in question at the trial. And the plaintiff's right to costs in such a case will not be affected by or depend upon the nature or facts of the special plea; for although such plea should not make title to the land mentioned in the declaration, or even be such a one as to preclude the possibility of bringing the title into question thereon, as, for instance, a disclaimer of title, that the trespasses were involuntary, and tender of amends, or a license, the plaintiff will still be entitled to full costs, if he obtain a verdict on that plea. The principle of these determinations is, that where the case is such that the judge who tries the cause cannot, in any view of it, grant a certificate, it is considered to be a case out of the statute.

**Account Books, Inspection of.** See tit. *Inspection of Documents.*

* A banker's pass-book, delivered to his customer, in which there are entries on one side only, is not evidence of an adoption of the contents of the book between the parties, although the customer keeps the book without making any objection to the entries contained in it. (*Ex parte Randleson*, 2 Dea. & Ch. 534).

# Account, Action of*.

BAXTER *v.* HOZIER, H. T. 1839. C. P. 5 *Bing. N. S.* 288; S. C. 7 *Scott*, 233.

In an action of account against a co-partner and bailiff, upon a plea amounting to that of plene computavit, the evidence did not shew that the result of the account so rendered was a balance ascertained and agreed upon between the parties; but the plaintiff insisted that, in the account, defendant should be charged as factor only for a moiety, and as a partner for the other, and liable to losses.

The Court held the evidence not sufficient to sustain the plea, and that the plaintiff was entitled to judgment quod computat generally upon the whole declaration; and that the account should be taken according to the real relation between the parties.

In an action of account against a tenant in common, to support the plea of plene computavit, the evidence must shew how the balance was ascertained.

# Account stated.

I. OF WHAT CONSTITUTES AN ACCOUNT STATED, p. 37.
II. BY AND WITH WHOM TO BE STATED, p. 40.
III. OF THE EFFECT OF STATING AN ACCOUNT, p. 40.
IV. OUGHT TO BE REFERRED TO IN PARTICULARS, p. 43.
V. WHEN REQUISITE TO BE STAMPED, p. 43.
VI. PLEADINGS CONNECTED WITH ACTIONS UPON, p. 44.
VII. EVIDENCE IN ACTIONS UPON, p. 45.
VIII. DAMAGES IN ACTIONS UPON, p. 51.

## I. OF WHAT CONSTITUTES AN ACCOUNT STATED.

CLARKE *v.* WEBB, T. T. 1834. Ex. 1 *C. M. & R.* 29; S. C. 4 *Tyrw.* 673; S. C. 2 *D. P. C.* 671.

ACTION for use and occupation, and on an account stated. Defendant was the assignee of an insolvent debtor, and by his direc-

An account stated, in a tech-

* The proceedings in an action of account being intricate, dilatory, and expensive, it is now almost obsolete, especially as a preference is given to the modern and more effective practice, either of supporting an action for money had and received, or, if the matter be of a complicated nature, by proceeding in a Court of Equity. (See Eq. Ca. Ab. 5; 7 Ves. Rep. 585; 3 Wils. 73; 2 Show. Rep. 301). At the common law, account was only maintainable against a guardian in socage, (1 Inst. 89), receiver or bailiff, (1 Inst. 89), and for the benefit of trade and commerce, by one merchant against another; (Bac. Abr. tit. "Account"); but now, by several statutes, this remedy is given to executors, (14 Edw. 3, c. 23), executors of executors, (25 Edw. 3, c. 4), and administrators, (25 Edw. 3, c. 5);

nical sense, is an account referrible to former transactions between the parties;

tion certain fixtures belonging to the insolvent had been removed from his house and sold. The defendant never occupied the premises; but it was shewn, that, in consideration of being allowed to receive the fixtures, he had promised the plaintiff to pay 7*l.*, or a quarter's rent. This sum was sought to be recovered under the account stated; but Lord *Lyndhurst* held, that, in order to recover in an account stated, it ought to appear that the account is stated with reference to former transactions between the parties.

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LUBBOCK *v.* TRIBE, E. T. 1838. Ex. 3 *M. & W.* 607.

and must comprise an admission of a subsisting debt due from the defendant, payable to the plaintiff*.

THE defendant being indebted for shares to the K. Company sent a check to the plaintiffs, their agents, which was by them lost; and upon a correspondence between them and the defendant, the latter offered to give a fresh check if the plaintiffs would give an indemnity; the plaintiffs having paid the amount to the K. Company,

The Court held, that, as there was no antecedent debt shewn to have existed between the parties, the count upon an account stated could not be sustained; and that although an acknowledgment of a sum due from A. to B. is some evidence of an account stated between them, and if uncontradicted may go to the jury as an admission of that balance, and of an implied promise to pay it; but it extended no further, and might be explained.

*See Tucker* v. *Barrow*, 7 *B. & C.* 624, *S. P.*

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PINCHON *v.* CHILCOTT, T. T. 1827. N. P. 3 *C. & P.* 236.

Hence, a subsequent acknowledgment of a specific sum being due will sustain an account stated, though founded on a verbal contract for unsevered crops†.

ACTION for goods sold, and on an account stated. A verbal agreement was proved to have been made for the purchase of some turnips growing in a field. After the purchaser had removed the principal part, the seller said to him—"You owe me 3*l.*," to which he replied, "I will send it before I draw any more turnips." He afterwards drew all the turnips, but did not send the 3*l.*

*Best*, C. J., said that the conversation was sufficient evidence to support the account stated.

and, by the 4 Anne, c. 16, s. 27, it may be supported against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint-tenant, or tenant in common, his executors and administrators, against his co-tenant, and their respective personal representatives, for receiving more than his share or proportion of the rents and profits. But this action cannot be sustained by one executor against another; for the actual possession of one is constructively the possession of his co-executor, (B. N. P. 271), nor against an infant, (1 Inst. 172), or disseisor, or other wrong doer; for, in order to support an action of account, there must be either a privity in law, or a privity in deed, arising from the contract of the parties. (1 Inst. 1726). And joint-factors or bailiffs may be sued jointly, though only one be the actual defaulter. (2 H. Bl. 235).

* Without qualification or condition; for where the plaintiff, in a conversation with the defendant, said, "Pay me the 10*l.* you owe me," the defendant said he would, provided the plaintiff had not moved the grates, which he considered as fixtures; the plaintiff, in reply, denied that they were fixtures, and told the defendant, that, if he would not pay him, he would sue him:—Held, not sufficient. (*Evans* v. *Verity*, 1825, N. P., R. & M. 239).

† And, in *Knowles* v. *Michel*, (13 East, 249) it was holden, that an admission, by a defendant, that a certain sum was agreed to be paid to the plaintiff for the

SEAGO *v.* DEANE, H. T. 1828. C. P. 4 *Bing.* 459; S. C. 1 *M. & P.* 227; 3 *C. & P.* 170.

So even in connection with an agreement for the conveyance of an interest in land.

IT appeared that the defendant had granted the plaintiff a lease of premises, with the usual covenants. The agreement (a verbal one) was proved by the plaintiff's daughter; who also proved that when the plaintiff paid the first quarter's rent, she asked for the 20*l.* which the defendant had promised to allow her for the repairs which she had done, and that he said it was not convenient for him to pay it then, but he would at the next quarter. The learned judge thought, that, as the defendant had agreed to allow the plaintiff 20*l.* to do repairs, and as she had done them, and he had afterwards promised to pay, the plaintiff was entitled to a verdict on the account stated; and, on a motion for a new trial, the Court approved of the ruling at Nisi Prius, observing that, although the original contract was not binding on the defendant, yet his subsequent acknowledgment and promise were clearly admissible in evidence to support the account stated.

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LIDDARD *v.* HOLMES, M. T. 1835. Ex. 2 *C., M., & R.* 586; S. C. 1 *Tyrw. & G.* 9.

A surveyor of highways delivering over his books to his successor, with an understanding that the latter should reimburse him out of future collections for his advances, may sue as upon an account stated.

ACTION by the plaintiff, a late surveyor of highways. It appeared that the plaintiff being in advance agreed to deliver up the books to the defendant, to enable him to collect the rates, the latter undertaking to reimburse him what was due out of the monies he should collect, and the book was delivered over; but the defendant having collected neglected to pay:—Held, that the plaintiff was entled to maintain the action on an account stated.

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PORTER *v.* COOPER, 1834. N. P. 6 *C. & P.* 354.

So, a sum ordered as the payment of the costs of the day of an indictment at the sessions may be recovered under a count upon an account stated;

IT was agreed that the trial of an indictment at the sessions should be postponed, the defendant agreeing to pay the costs of the day. The costs were taxed; and at the subsequent sessions, the counsel for the prosecution asked if there was any objection to the amount? The defendant's counsel said there was not, except as to 1*l.* 9*s.* The attorney for the prosecution said he would give up that sum, and the defendant's attorney said he would give a check for the residue. After this the defendant was applied to for payment, and he said his attorney, who received his rents, would arrange it. The Court held, that the indorsement on the brief was an agreement; and also that on this evidence the plaintiff could recover the amount of the taxed costs, minus 1*l.* 9*s.*, on the count upon an account stated.

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SPENCER *v.* PARRY, E. T. 1835. K. B. 4 *N. & M.* 770; S. C. 3 *A. & E.* 331.

but the offer of a cognovit after action brought will not sustain such a count.

TO support the account stated, it was proved, that, after the commencement of the action, the defendant offered to give a cognovit. It was contended, on the part of the plaintiff, that the offer of a

sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count on an account stated, but not a count for goods sold and delivered.

cognovit was sufficient to support a verdict on the count upon an account stated. The learned judge, being of a different opinion, nonsuited the plaintiff.

And the Court held the nonsuit right.

## II. BY AND WITH WHOM TO BE STATED*.

## III. EFFECT OF STATING AN ACCOUNT†.

COCKS *v.* NASH, H. T. 1834. C. P. 4 *M. & Scott*, 162.

The statement of an account may create a separate liability when a prior joint one is discharged by release.

A. and B. gave their joint and several promissory note to the plaintiff for a partnership debt. Afterwards the plaintiff, by deed, released it. In an action against B., on the promissory note and account stated, the release given to A. was pleaded.

On demurrer, it was contended, that although the release of one of two makers of a joint and several promissory note enured to the discharge of both; yet that, inasmuch as the giving of the note did not in any respect alter the nature and character of the original debt, the plaintiff was at liberty to resort to the consideration, and therefore entitled to recover under the count upon an account stated.

And of that opinion were the Court.

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SHOW (Assignee of Howard & Gibbs, Bankrupts) *v.* PICTON, M. T. 1825. K. B. 4 *B. & C.* 715; S. C. 7 *D. & R.* 201.

An agent of two persons admitting money to have been received on account of one, cannot afterwards deny the fact, though he may not actually have re-

THE bankrupts had been the mutual agents of the grantors and grantees of certain annuities, and had permitted the latter to draw upon the faith of the annuities having been received. The Court held, that, the bankrupts having voluntarily taken upon themselves to give credit for the payments, were not at liberty afterwards to say they had not been received; and that, although, if an agent make an entry unintentionally and under a mistake, there is no doubt that he is at liberty to correct it; but if otherwise, then he is bound by it. So far from the bankrupts acting in error, they did it

* The account must be stated with the plaintiff, or his authorized agent; (*Breckon* v. *Smith*, 1 A. & E. 488, post); and with the defendant a mere acknowledgment to a stranger in casual conversation will not suffice. (Id.; and see B. N. P. 129; 4 Price, 214; 5 B. & C. 196). Nor is an account stated available against an infant, (*Hedgley* v. *Holt*, M. T. 1829, N. P., 4 C. & P. 105), even although it be made with respect to necessaries supplied to him; (*Trueman* v. *Hurst*, 1 T. R. 40); in such a case a nol. pros. should be entered as to that part of the declaration.

† The statement of an account is not conclusive. (*Trueman* v. *Hurst*, 1 T. R. 40). After an adjustment of mutual demands, and a balance struck, it cannot be objected, that part of the plaintiff's demand was that for which an account could not have been originally supported; (6 Esp. 24); and a defendant, by accounting with the plaintiff, as invested with a particular character; and receiving credit from him in that capacity is estopped from disputing his title to the particular character. (10 East, 104). Where a partnership has been dissolved, and a balance struck between the partners, and there has been a promise to pay such balance, it may be recovered under this count; (*Foster* v. *Allanson*, 2 T. R. 479); but such an action will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership; (*Fromont* v. *Coupland*, 2 Bing. 170); nor, as it seems, without an express promise to pay the balance. (Ib.; but see *Rackstraw* v. *Imber*, Holt, 368; *Clark* v. *Glennie*, 3 Stark. 10; *Henley* v. *Soper*, 2 M. & R. 166; 8 B. & C. 20, S. C. See *post, tit.* "*Partners.*"

deliberately for the purpose of keeping up an appearance of credit with the grantee of the annuity, and for the purpose of lulling all suspicion as to the manner in which the bankrupts stood with relation to the grantors of annuities.

ceived it, unless the entry be made in mistake;

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SKYRING *v.* GREENWOOD, T. T. 1825. K. B. 4 *B. & C.* 281; S. C. 6 *D. & R.* 401; S. C. 1 *C. & P.* 519.

THE defendants, as paymasters, received money from government generally, on account of the corps of which the plaintiff's testator was major; and an order having been issued for an increase of pay to certain officers, they, supposing him to have been entitled to it, gave him credit for it in the accounts rendered; and, after a notice from government, that persons in his situation would not be entitled to such increase, had forborne to communicate information thereof to him, and continued during several years after to give him credit for these allowances. The Court held, that the defendants, not merely having made an error in such accounts, but been guilty of a breach of duty, they could not be permitted either to recover back, or retain by way of set-off, the sums which they had once allowed him in account.

nor, after giving a party credit for sums of money as actually received, and inducing him to act upon that belief, can the receipt be disputed.

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SHAW *v.* WOODCOCK, T. T. 1827. K. B. 7 *B. & C.* 73.

THE agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, and gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, and paid the balance of the accounts as if they had been received, and in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid. Upon a bill of exceptions, the Court held, that the jury were properly told by the judge that they might infer an agreement whereby the agent made himself personally responsible for the payment of these annuities and instalments in default of payment by the grantors.

Where an agent charges himself, in account with his principal, with the receipt of money, and takes credit therein as if actually received, it is a question for the jury, whether he has made himself personally responsible for the payment by the original debtor.

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SKYRING *v.* GREENWOOD, M. T. 1824. K. B. 4 *B. & C.* 281; S. C. 6 *D. & R.* 401; S. C. 1 *C. & P.* 517.

THE plaintiff, being the representative of a deceased officer of artillery, of which corps the defendants were paymasters, they delivered to him an account current, in which they acknowledged themselves to have received, from the year 1806 to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806. The Court held, that they could not in 1821 be permitted to say that this admission was by mistake, as in 1816 the Board of Ordnance had announced, that, by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it, this announcement of the Board never having been communicated to the deceased by the defendants till the year 1821.

After long acquiescence in an account rendered, a party cannot be permitted to dispute its correctness;

LEWIS *v.* EASTMURE, 1838. N. P. 8 *C. & P.* 205.

nor, in the absence of the proof of fraud, can a settled account be opened;

ACTION on a schoolmistress's bill, with a plea of set-off for money had and received. It was opened, on the part of the defendant, that a friend of his (since dead) had paid former school accounts due from the defendant to the plaintiff, and in settling those accounts had paid overcharges, of which the defendant now meant to avail himself in his plea.

Lord *Abinger* decided, that, in the absence of fraud, the settled accounts could not be opened.

*See Waller* v. *Andrews*, 3 *M. & W.* 312.

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ROSE *v.* SAVORY, T. T. 1835. C. P. 2 *Bing. N. S.* 145; S. C. 2 *Scott*, 199.

but stating an account does not preclude the parties from objecting to items embodied in it as illegal.

THE plaintiffs, assignees of an insolvent legatee, sought to recover from the defendant's executors a sum of 622*l.* 3*s.* 10¼*d.* In the account stated by the defendants, which alone made them liable for the legacy in a court of law, they admitted a balance of 167*l.* 3*s.* 10¼*d*, but stated the assignment of the remainder by the insolvent to one of the defendants in payment of a just debt. The plaintiffs contended, that they were entitled to the full amount of the legacy which came into the hands of the executors; the latter argued, that, in point of law, they were justified in retaining the balance, the assignment not being invalid under 7 Geo. 4, c. 57, s. 32, and that the account was not conclusive, but only primâ facie evidence; in which view the Court concurred, holding, that such account was not conclusive or binding upon the plaintiffs, so as to prevent explanation; but that it was competent in them to invalidate the claim by shewing that the assignment, being fraudulent, was a nullity.

*See Randle* v. *Blackburne*, 5 *Taunt.* 245, *and* 6 *Esp.* 24.

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ROPER *v.* HOLLAND, E. T. 1835. K. B. 4 *N. & M.* 668.

An order by defendant as trustee to pay a sum as a balance to a cestui que trust is evidence of an account stated, and precludes him from denying the existence of such balance*.

THE defendant, the trustee of the plaintiff's wife, was to pay her 100*l.* per annum, charged on a house and farm, after deducting the necessary repairs, &c. The defendant received 77*l.* for rent, and paid the plaintiff 50*l.*; and having paid for some repairs, he paid 10*l.* into a bank, with directions to the clerk to pay it to the plaintiff upon her giving a receipt for 27*l.*

In an action upon an account stated, it was contended, that the evidence did not amount to an account stated.

*Sed per Cur.*—It is clear, if a trustee sends an account, and admits a balance, he is liable to be sued at law. This defendant has admitted a balance. He stated, in effect, that he had paid 17*l.* for repairs, and would pay over the remainder to the plaintiff.

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HOPKINS and WIFE *v.* LOGAN, E. T. 1839. Ex. 5 *M. & W.* 241.

On an account stated, the im-

IN assumpsit by H. and E. his wife, the declaration alleged, that, after the intermarriage of H. and E., an account was stated by H.

* Sed qu. as to conclusiveness of such an account stated. See authorities quoted by the reporters, p. 671, n., and cases supra.

for and on behalf of himself and E., on the one part, and the defendant on the other, concerning certain monies, to wit, 1000*l.*, by E., when she was unmarried, lent to defendant, and remaining unpaid at and after the time of such intermarriage; and concerning certain other monies, to wit, 555*l.*, by the defendant, before the statement of the said account, paid to H., and which H. borrowed on behalf of himself and E. at the time of the said account, and, at the request of the defendant, agreed should be taken and considered as satisfying so much of the first-mentioned sum of money; and upon the account so stated, the defendant was found to be and then was in arrear and indebted to the plaintiff in the sum of 445*l.*, residue of the first-mentioned sum of money; and being so found in arrear, &c., the defendant promised to pay the last-mentioned sum of money on the 10th of October then next ensuing, which period had elapsed before the commencement of this suit. Breach, non-payment.

On demurrer to plea, the Court held the declaration bad; for where the law implies a promise to pay in præsenti, a promise to pay at a future day cannot be supported without some new consideration.

plication of law is that the debtor is to pay on request, and not on a future day.

## IV. OUGHT TO BE REFERRED TO IN PARTICULARS.

SIGGERS *v.* NICHOLLS, H. T. 1839, B. C. *MS.*; semb. S. C. not S. P. 7 *D. P. C.* 551.

THE plaintiff declared on a bill of exchange, with a count on an account stated. In his particulars he omitted to state, that he intended to rely on all the counts. *Patteson*, J., held, that on failure of proof of the first count he could not resort to the second.

Recourse cannot be had to the account stated, unless the particulars state, that the plaintiff will rely upon it or upon all the counts;

FISHER *v.* WAINWRIGHT, E. T. 1836. Ex. 1 *M. & W.* 480.

THIS was an action on an undertaking, entered into by the defendant, to pay such costs as the plaintiff (an attorney) might be subjected to, in an action brought by him against G., a third party, on a bill, the second count as against the indorser of the bill, and there were counts for money paid, and on an account stated. The plaintiff first delivered a bill of particulars in general terms, as for a balance of money due, and for interest; and afterwards, under a judge's order for particulars "of the bill of costs, charges, and expenses mentioned in the first count," a second bill of particulars, only applicable to such first count, for which the defendant paid into Court a sum covering the costs out of pocket. The Court held, that, as the defendant could not be misled, the plaintiff was entitled, under such particulars, to recover the rest of his bill of costs upon an account stated.

But where the defendant could not be misled by particulars referring only to *first* count (which was special), he may recover on account stated, though the particulars do not allude to last count.

## V. WHEN REQUISITE TO BE STAMPED*.

* An account, which is a mere statement and record of past transactions, may be given in evidence without being stamped; (*Wellard* v. *Moss*, 1 Bing. 134); but an account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp. Such entries form an account current, where the sums stated to be received are not written on the account at and upon the receipt of the money, but long after, and only amount to

## VI. PLEADINGS CONNECTED WITH ACTIONS UPON*.

REG. GEN. H. T. 1834.

A count on an account stated may be joined with any other count for a money demand.

A COUNT for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish any distinct subject-matter of complaint in respect of each such counts.

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SPYER *v.* THELWELL, M. T. 1835. Ex. 2 *C., M., & R.* 692; S. C. 1 *Tyrw. & G.* 191; S. C. 4 *D. P. C.* 509.—FERGUSSON *v.* MITCHELL, M. T. 1835. Ex. 2 *C., M. & R.*, 687; S. C. 4 *D. P. C.* 513.

It has been held that a count on an account stated omitting to allege the time when it was stated, is bad on special demurrer;

IN this declaration, the account stated was for money found to be due from the defendant to the plaintiff on an account stated between them.

On demurrer, on the ground that no time is alleged at which the accounting took place, it was said that the Court have already expressed an opinion, in *Fergusson* v. *Mitchell*, supra, that the want of the word "then" is fatal on special demurrer.

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LEAF *v.* LEES, H. T. 1837. Ex. 4 *M. & W.* 579; S. C. 7 *D. P. C.* 189; S. P. WEBB *v.* BAKER, H. T. 1838. K. B. 3 *N. & P.* 87; S. C. 7 *A. & E.* 841; S. P. BINGLEY *v.* DURHAM, M. T. 1838. K. B. 1 *P. & D.* 58; S. C. 8 *A & E.* 775.

but a contrary rule now obtains.

IN debt for goods sold, the account stated was "for money found to be due on an account *before then* stated." On demurrer, because no time was alleged at which the account was stated,

*Sed per Cur.*—The practice should be uniform. The Court of King's Bench have decided, that the allegation of time in a count upon an account stated is unnecessary; and we shall adhere to the same opinion.

*See Lane* v. *Thelwell*, 1 *M. & W.* 140; *S. C.* 4 *D. P. C.* 705.

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STEVENS *v.* WILLINGALE, 1836. 7 *C. & P.* 702.

Where evidence can be given of

DECLARATION in assumpsit for money lent and on an account stated, and the particulars contained only one item for money lent,

admissions of money received at an antecedent time. (*Wright* v. *Shawcrop*, 2 B. & A. 501, n.; *Jacob* v. *Lindsay*, 1 East, Rep. 460; *Hawkins* v. *Ware*, 3 B. & C. 690).

A promissory note, not properly stamped, cannot be given in evidence as an admission by the maker upon a count on an account stated; (*Green* v. *Dacres*, 4 B. & C. 235); but if admitted it will be evidence of an account stated at the time of the date; and, in answer to a plea of the Statute of Limitations, will shew that the cause of action did not arise till the time at which it is payable. (*Wheatley* v. *Williams*, 1 M. & W. 533).

* An account stated cannot be pleaded in bar to an action. (*Roades* v. *Barnes*, 1 Keny. 391; S. C. 1 Burr. 9; S. C. 1 W. Bl. 65; S. P. *Adderley* v. *Evan*, 1 Keny. 250; see *May* v. *King*, 1 Ld. Raym. 680; S. C. 12 Mod. 537). The two last cases, however, were decided upon the ground of the plea being equivalent to the general issue. The correct principle, upon which such a plea is bad, is, that it merely substitutes one right of action for another, giving no advantage to the creditor or plaintiff. As a count upon an account stated cannot be supported against an infant, even for necessaries, a nolle prosequi should be entered as to that count, when the defendant pleads his minority. (*Trueman* v. *Hurst*, 1 T. R. 40; *Hedgley* v. *Holt*, 4 C. & P. 104).

and it appeared that the debt arose out of a bet:—Held, by that, on the plea of non assumpsit, the question of illegality did not arise, and that the plaintiff might consistently recover on the latter count.

an account stated, and defendant pleads non assumpsit only, he cannot shew that the items were illegal.

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FIDGETT *v.* PENNY, T. T. 1834. Ex. 1 *C., M., & R.* 108; S. C. 4 *Tyrw.* 650; S. C. 2 *D. P. C.* 714, semb.—S. P. SINCLAIR *v.* BAGGALEY, T. T. 1838. Ex. 4 *M. & W.* 312.

DECLARATION in assumpsit on an account stated. The plaintiff, in February, delivered in an account, which was settled in favour of plaintiff; afterwards, in March, a second account was stated in the defendant's favour. The plaintiff, having brought an action on the first account, the Court held, that the defendant could not, under the general issue, avail himself of the second account, either as a payment or a set-off; for he ought to have pleaded the former; or if the items in the first account formed no part of the second, they would constitute a distinct demand, of which the defendant might have availed himself, if he had pleaded it as a counterclaim.

Under non assumpsit to a count on an account stated, defendant cannot give in evidence a subsequent account stated; such latter account must be specially pleaded.

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## VII. EVIDENCE IN ACTIONS UPON*.

ASHBY *v.* ASHBY, E. T. 1829. C. P. 3 *M. & P.* 186.

A MEMORANDUM had been given to the plaintiff on a receipt stamp, in these terms: "Received of E. A. 150*l.*, which we promise to pay," &c.; and the Court held it was not receivable in evidence for want of a promissory-note stamp; there was no count for goods sold, which had been the consideration; but, as the defendant had acknowledged that he owed the testatrix 150*l.*, without referring to the note, the plaintiff might recover on the count for an account stated.

An acknowledgment of a certain sum being due will sanction an account stated, though a bill not duly stamped has been given for the amount;

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PAYNE *v.* JENKINS, M. T. 1830. N. P. 4 *C. & P.* 324.

THIS was an action on an I. O. U. for 6*l.* 10*s.* It was opened, that the plaintiff, being the owner of an Arabian mare, the defendant gave 25*l.* in cash, and this I. O. U., as the price of a half share in the animal. The witness stated, that there was a written agreement between the plaintiff and defendant for a partnership in the mare, and that the I. O. U. was part of the price paid for the defendant's share; the mare, before that partnership, having been

or on an I. O. U., although given as the consideration of an agreement not declared upon†;

* The statement of an account is not conclusive. (*Trueman* v. *Hurst*, 1 T. R. 40). It suffices to prove the result, without giving evidence of the several items constituting the account; (*Bartlett* v. *Emery*, 1 T. R. 42, n.); but some privity must be shewn; (*Wharton* v. *Walker*, 4 B. & C. 163; 2 D. P. C. 546; 1 A. & E. 488); except on transactions arising on bills of exchange; (*Wagstaff* v. *Boardman*, MS.); and proof of one item is sufficient to maintain the count. (*Highmore* v. *Primrose*, 5 M. & S. 65). Such a count is established by shewing that the plaintiff and defendant were present when the clerk of the former made entries in a book, and the latter admitted he owed a balance, but at the same time added, "that when he had done certain things for the plaintiff, there would not be much, if anything, between them." (*Rigby* v. *Jeffrys*, H. T. 1839. B. C. 7 D. P. C. 561).

† Or although the I. O. U. be not addressed to the plaintiff, or any other party. (*Douglas* v. *Holme*, M. T. 1840. Q. B. MS.)

the sole property of the plaintiff. The I. O. U. was not stamped, and was made in the following form:—"I. O. U. 6*l.* 10*s.* 0*d.* Wm. Jenkins."

Lord *Tenterden*, C. J.—An I. O. U. has been admitted on the account stated a great many times. The written agreement has nothing to do with it. He gives this as the price of becoming a partner; he pays it for having the written agreement.

*See* 1 *Esp.* 225; 1 *Campb.* 499—501, *n.*; *D. & R. N. P. C.* 8.

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CALVERT *v.* BAKER, M. T. 1838. Ex. 4 *M & W.* 417.

but there must be evidence of some distinct acknowledgment of the debt by the defendant.

THE declaration against the acceptor of a bill of exchange contained a count on the bill and an account stated. At the trial, it appeared that the acceptor of the bill, on application to him for payment, answered, that the bill had been altered as to the acceptance by being made payable at a particular place; that he never made it payable there nor elsewhere than at his own house, and that he should take such steps as the law would authorize on the subject; that he had been prepared for payment, and the party might have the money by calling at his house. The Court held, that the evidence did not establish an account stated.

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HUGHES *v.* THORPE, M. T. 1839. Ex. 5 *M. & W.* 656.

And proof of the sending an unanswered letter, stating that he thinks he is indebted to a named amount, will be of no avail;

ACTION for money had and received to the use of the Agricultural and Commercial Bank of Ireland, and on an account stated. The defendant, who was a member of the company, wrote to the manager of it the following letter:—

"Northern and Central Bank of England, Manchester,
"April 5th, 1836.

"Dear Sir.—I find there is some mistake upon the payment of my calls on your shares; for Mr. Syle informs me he has not debited my account, and credited you for the payment of the several calls due. When I received my last scrip, the letter stated that I was debited in 1000*l.* for the additional 100 shares I took, but, by some oversight, this has not been carried through your books. Please debit me upon that date with the amount of the calls due on my 200 shares. I think it will be 500*l.* the second call on the first 100 shares, and 1000*l.* for the two calls on the second 100 shares, and advise me in a private letter. Your bank shall of course be credited here upon that date. Yours &c."

No answer was sent to this letter. The Court held, that, to constitute an account stated, there must be a statement of some certain amount of money being due, and it must be made either to the party himself, or to some agent of his. The letter was sent to the agent, but contains no admission of any sum certain being due.

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BRECKON *v.* SMITH, T. T. 1834. K. B. 1 *A. & E.* 488.

and the admission must be made to the plaintiff or his agent—

IN an action for goods sold and account stated, the proof to establish the account stated was, that the plaintiff admitted, in a conversation with a third person, not shewn to be an agent of the plaintiff, that he owed the latter 15*l.* 10*s.* Upon this evidence, the plaintiff was nonsuited. On motion to set the nonsuit aside—

*Per Cur.*—The evidence is not sufficient; no privity between the plaintiff and the party to whom the acknowledgment was made, is shewn.

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ALLEN *v.* COOK, T. T. 1834. K. B. 2 *D. P. C.* 546.

before action brought or an account proved to have existed between the parties prior to the suit, and to which the acknowledgment could relate.

ACTION by indorsee against accept or of a bill of exchange, and on an account stated. The bill had no stamp; the plaintiff resorted to the count in the declaration on the stated account, and proved, that when the defendant, on being served with the writ, saw the amount of 19*l.* indorsed on it, said—"I have paid 7*l.*, and therefore only 12*l.* remains due. The jury found a verdict for the plaintiff, but *Taunton*, J., made a rule absolute for setting it aside, observing, that there was no prior debt. There was nothing to which the acknowledgment could apply, except the demand indorsed on the writ. There was, therefore, no evidence sought to be given on the account stated, except the one acknowledgment, which was not evidence of any debt prior to the action being brought. That acknowledgment being after the writ was sued out, it could not be given in evidence in support of the count on the account stated.

*See* 13 *East*, 249; 5 *M. & S.* 65.

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TUCKER *v.* BARROW, H. T. 1828. 7 *B. & C.* 623; S. C. 1 *M. & R.* 518; S. C. 3 *C. & P.* 85; S. C. 1 *M. & M.* 137.

Admission by a defendant of facts, from which inference of legal liability may be drawn, or made under compulsion, is not sufficient to sustain an account stated.

ACTION of assumpsit, in which the assignees of a bankrupt sought to recover a sum of money received by the defendant on account of the bankrupt, with knowledge of a previous act of bankruptcy, but which he claimed to retain for money due to him from the bankrupt. There was no count in the declaration for money had and received by the defendant to the use of the plaintiffs as assignees, but there was a count on an account stated between the defendant and the plaintiffs as assignees. To shew that the defendant had received the money in question, the plaintiffs put in an examination of the defendant taken before the —— Commissioners. In answer to questions put to him on the subject of this money, the defendant admitted that he had received it after knowledge of the act of bankruptcy, and he gave the date of his receiving it. The Judge who tried the cause was of opinion, that this was not evidence sufficient to maintain the count for an account stated with the assignees; and as there was admittedly no other count upon which the plaintiffs could raise any argument in their favour, they were nonsuited.

*Per Cur.*—If there had been an acknowledgment of a subsisting debt, it would have been evidence under the account stated: looking at this acknowledgment, the defendant does not admit a subsisting debt. We incline to think, that an admission on a compulsory examination before commissioners, would not be evidence of an account stated. The cases in which an admission has been held to have that effect, have been where the admission has been made either to the plaintiff, or to some person authorized by him; but here the party is bound to answer, and does not account voluntarily.

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DAVIS *v.* WILKINSON, Ex. 1839. K. B. 2 *P. & D.* 256.

So an agreement to pay part of a sum by instalments, and the remainder to go as a set-off, is evidence of an account stated.

THE declaration alleged, that the plaintiff accounted with the defendant; and, in consideration thereof, agreed to pay the plaintiff or order the sum of 695*l.* at four instalments, viz. the first on &c., being 200*l.*, the second on &c., being 150*l.*, the fourth on &c., being 100*l.*, the remainder 95*l.*, to go as a set-off for an order of R. to I., and the remainder of his debt from the plaintiff to him. At the trial, it was proved that he had lent money to the defendant.

*Per Cur.*—It is objected, that the agreement does not contain any consideration on the face of it; and it certainly does not; but the declaration states that the parties came to an account, and on the account the defendant was found indebted to the plaintiff, &c., and in consideration thereof made the promise; and it seems to us, that the paper itself is evidence of the consideration; not, indeed, on the ordinary count for an account stated, but according to the old form.

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CHURCHILL *v.* DAY, M. T. 1828. K. B. 3 *M. & R.* 71.

So payment of money into Court on that count, is an acknowledgment, but must be confined to that count.

DECLARATION for work and labour, money paid, &c., and an account stated. Upon the account stated, the defendant paid money into Court.

The Court held, that it was an admission of an account stated. As the money paid into Court must be applied to the only sum recoverable on the counts on which it is paid in, it would be dangerous to say, that if money is paid into Court upon one count, and in the declaration another count is found more accurately applicable to the plaintiff's cause of action, the effect of the payment should be defeated.

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PIERCE *v.* EVANS, T. T. 1835. Ex. 2 *C., M., & R.* 294.

An item in the account, it may be shewn, was not intended to be included in it;

THE plaintiff relied upon an account stated to recover the sum of 50*l.* The defendant proved that the debt arose out of a written undertaking on his part (which he had obtained from the plaintiff and destroyed) to remit the plaintiff 50*l.*, which sum he, the defendant, held of H. P., and by him authorized to pay the plaintiff, and called H. P., who swore that he never authorized the defendant to pay the money for him, and that he had since settled all his accounts with the plaintiff.

The Court held the evidence admissible, as tending to shew that the item was not intended to be inserted in the account stated.

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WAYMAN *v.* HILLIARD, M. T. 1830, C. P. 7 *Bing.* 101; S. C. 4 *M. & P.* 729.

and a mere offer to purchase peace is not evidence.

DECLARATION on a special agreement by an outgoing with an incoming tenant, that the latter should allow the former for all crops sown before a certain time. The declaration also contained a count upon an account stated.

It appeared, that, previously to the commencement of the action, on the plaintiff demanding 40*l.* as a compensation, the defendant offered him 17*l.* This, it was contended, on the part of the plaintiff, was evidence to support the account stated. The suggestion was overruled, and the plaintiff nonsuited.

And on motion to set it aside, the Court said, to support an account stated, there must be an absolute acknowledgment of the debt. Here the demand was disputed; there was a mere offer to pay 17*l.*, which was not assented to. It was a mere attempt to *purchase peace.*

*See* 13 *East*, 249.

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WHARTON *v.* WALKER, E. T. 1825. K. B. 4 *B. & C.* 163; S. C. 6 *D. & R.* 288.

Nor will proof of money due from the defendant to a third person support an account stated, as of money due from the defendant to the plaintiff.

ONE Lythgoe, being indebted to the plaintiff, gave him an order upon the defendant, his (Lythgoe's) tenant, to pay the debt out of the rent next coming due. The plaintiff sent the order to the defendant without directly communicating with him thereon. On settling the next rent between Lythgoe and the defendant, the defendant produced the order to Lythgoe, and promised to pay the amount to the plaintiff; upon which Lythgoe gave him a receipt for the whole rent, but received only the difference between the sum due to the plaintiff and the whole rent.

In an action for money had and received, and account stated, it was contended that the facts were sufficient evidence to sustain the latter.

*Per Cur.*—As to the account stated, it cannot be said that this was an account stated of money due and owing to the plaintiff; for, it was due and owing to Lythgoe. Again, the original debt due from Lythgoe was not extinguished. In the supposed case put by *Buller*, J., in *Tatlock* v. *Harris**, the extinguishment of the original debt was an ingredient. In the present case, even if the parties had met and agreed, and the debt from Lythgoe had been discharged, still, no money having been received by the defendant to the plaintiff's use, the latter must have declared specially on the agreement.

*See Cowp.* 23; 1 *T. R.* 133; 1 *H. Bl.* 241.

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BURGH *v.* LEGGE, T. T. 1839. Ex. 5 *M. & W.* 418.

So a request not to send notice of dishonour of a bill, as part of the money would be sent on a future day, is not evidence of an account stated.

DECLARATION on two bills of exchange, with an account stated. Having failed to establish a claim on the bills, the evidence to support the account stated, disclosed, that, on the day when the first bill became due, the defendant called upon plaintiff, and told him, that he knew neither of the bills would be paid; that it was no use sending him a twopenny-post letter the next day to give him notice, as it was not worth the money, and that he would send the plaintiff money in part payment of the bills on a future day.

*Per Cur.*—The evidence does not admit a present debt: had it been shewn that the bills had been presented, and that notice of dishonour had been dispensed with, that might, perhaps, have been evidence to shew an account stated, but this is clearly not sufficient.

* In *Tatlock* v. *Harris*, 3 T. R. 180. Mr. Justice *Buller* says—"If A. owes B. 100*l.*, and B. owes C. 100*l.*, and the three meet, and it is agreed between them that A. shall pay C. the 100*l.*, B.'s debt is extinguished, and C. may recover that sum against A." This proceeds on the extinguishment of the original debt, effected by the agreement between all parties.

TARBUCK *v.* BISPHAM, M. T. 1836. Ex. 2 *M. & W.* 2.

So a banker's pass-book is not evidence of an account stated, where made by the banker, in an action by the representatives of the customer, the latter being a lunatic;

A. KEPT an account with B., a banker. Entries were made in the pass-book between A. and B., and balances occasionally struck. A. became a lunatic; the banker's account continued with the family of A., and the book, as before, from time to time balanced. A. ultimately died. In an action by the administrator of A., the pass-book was contended to be evidence to support the account stated.

*Per Cur.*—There is no evidence of any accounting with the lunatic; if with any body, it was with his agent, or one of his family; but a lunatic is not competent to appoint an agent: there is no account stated with any person who can be treated as the representative of the lunatic. But if the accounting had been with the lunatic himself, and were proved only by the entries in the pass-book, we have great doubts whether it would entitle the plaintiff to recover.

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EICKE *v.* NOKES, T. T. 1834. C. P. 4 *M. & Scott*, 585: S. C. 1 *Mood. & R.* 359.

nor an entry in a bankrupt's examination of a sum due, is not evidence of an account stated with the creditor.

DECLARATION on an attorney's bill, with an account stated. No bills of costs had been delivered, according to the statute. The only evidence was the examination and balance-sheet of the defendant under a commission of bankrupt issued against him in 1828, (since superseded), in which examination and balance-sheet the amount of the plaintiff's claim was acknowledged; and this, it was contended, was sufficient evidence to support a count upon an account stated.

At the trial, the plaintiff was nonsuited. And the Court discharged the rule for setting the nonsuit aside.

*See* 7 *B. & C.* 623; 1 *C. & M.* 483.

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SINGLETON *v.* BARRETT, E. T. 1832. Ex. 2 *C. & J.* 368.

A written account does not preclude parol admissions by the defendant.

THE particulars of demand were on an account stated, "as appears by a memorandum under the hand of the defendant, of a certain date." The memorandum was inadmissible for want of a promissory-note stamp. The Court held, that the account stated might be proved by other evidence than the memorandum, and that verbal evidence was admissible of an acknowledgment of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it.

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SMITH *v.* FORTY, 1829. N. P. 4 *C. & P.* 126.

And it seems an account stated is not within the 9 Geo. 4, c. 14, requiring a written acknowledgment to take a case out of the Statute of Limitations*.

THIS was an action by an administratrix, in which the Statute of Limitations was pleaded. It appeared, that the cause of action arose more than six years before; but that, within six years, the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance, which the defendant promised verbally to pay. It was objected, that this was within the 9 Geo. 4, c. 14; but *Vaughan*, B., said—I think the plaintiff has shewn a good cause of action upon the count on the account stated. The plaintiff does not sue upon the original debt at all. I take the statute to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption, raised by the Statute of Limitations, that the debt has been satisfied.

* Sed vide *Jones* v. *Ryder*, 4 M. & W. 32, *post, tit.* "*Limitations, Statute of.*"

## VIII. DAMAGES IN ACTIONS UPON.

DIXON *v.* DEVERIDGE, 1825. N. P. 2 *C. & P.* 109.

IT was proved that defendant had said he owed the debt, and that he would pay the plaintiff as soon as he could; but no sum was mentioned. On this evidence, Lord *Tenterden* directed a verdict for nominal damages.

An admission by defendant that he owes something, but no amount proved, entitles the plaintiff to nominal damages*;

but this doctrine has been denied†.

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BERNASCONI *v.* ANDERSON, E. T. 1828. N. P. 1 *M. & M.* 183.

To support the account stated, there was a mere acknowledgment of a debt being due, and a promise to pay; but no amount specified.

Lord *Tenterden*, C. J., held it insufficient to entitle the plaintiff even to nominal damages on the account stated, in which it is essential some amount should be stated.

*See* 2 *B. & B.* 99.

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**Accountable Receipt.** See tit. *Forgery.*

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**Accounts, of Constables.** See tit. *Constable*—**of Overseers.** See tit. *Overseers.*

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**Acquittal.** See tits. *Autre Fois Acquit—Indictment.*

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**Acquittal of one of several Defendants to make him a Witness.** See tit. *Witness.*

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**Accessary of Crime.** *See* 7 & 8 *Geo.* 4, *c.* 27, *s.* 8. See tit. *Threats and Threatening Letters.*

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**Ac Etiam‡ in Process.** (1 *Peters. Ab.* 159). See also tits. *Capias, Writ of—Summons, Writ of.*

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* But see *Green* v. *Davies*, 4 B. & C. 235; 1 M. & M. 183; 2 B. & B. 101; 4 B. Moore, 452.

† And the denial confirmed. (*Kirton* v. *Wood*, H. T. 1833. N. P. 1 M. & Rob. 253). But where, in order to take the case out of the Statute of Limitations, the plaintiff proved a payment by the defendant of 12*s.* as interest money, and there was no evidence of the amount of the debt, this was held to entitle him to a verdict for nominal damages. (*Leeson* v. *Smith*, 4 N. & M. 304).

‡ This clause was formerly inserted in bailable process. It described the cause of action, in addition to the common suggestion of a trespass having been committed by the defendant. It is now abolished, but in writs of summons and capias, it is necessary, according to sched. 3 & 4 Will. 4, c. 42, to give a concise statement

**Acknowledgment.** See tits. *Account Stated—Admissions—Bond—Confession—Evidence—Fine—Limitations, Statute of—Principal and Agent—Stamp.*

**Acquiescence *.** See tits. *Easements—Lights—Nuisance—Watercourse—Way, Right of.*

**Acquittal.** See tits. *Indictment—Information.*

of the form of action, as, "*In an action on promises,*" or, as the case may be. This instance was given merely as an example. An intelligible description of the form of action is alone required; therefore, a *generic* term need not be used, but one applicable to a particular division of a general form of action suffices, as in case, saying, "In an action for a libel," (*Pell* v. *Jackson*, H. T. 1834, B. C.—*Park*, J.; 2 Dow. P. C. 445), or slander, (*Davies* v. *Parker*, T. T. 1834. B. C. *Patteson*, J.; 2 Dow. P. C. 537). Or, in an action of covenant, saying "For breach of covenant;" (MS. T. T. 1834. K. B.); though, in the latter case, the words are rather descriptive of the wrong done than of the form of remedy intended to be resorted to. The rule H. T. 2 Will. 4, directed, that a variance between the ac etiam and the declaration, or the want of an ac etiam, when the defendant is arrested, should not be deemed grounds for discharging the defendant or the bail; but the bail-bond or the recognisance of bail should be taken with a penalty or sum of 40*l.* only. (See 2 East, 305; 1 Chit. Rep. 171; 1 Moore, 147; 7 Taunt. 458).

By R. G., E. T., 15 Geo. 2, a special clause was directed to be introduced in process against bail when sued on their recognisance, otherwise the defendant was not bound to accept declaration; the words are, "and also to a bill of the said plaintiff against the said defendant in a plea of debt upon recognisance, according to the custom of the Court to be exhibited." This rule, it would appear, is now necessarily superseded, both from the nature of the forms given and the express provisions of the Uniformity of Process Act. Formerly, a variance between the ac etiam and declaration was a ground for discharging defendant on entering a common appearance. (*Mayfield* v. *Davison*, M. T. 1829. K. B. 10 B. & C. 223. See *Collins* v. *Wright*, E. T. 1830. K. B. 10 B. & C. 814).

* Acquiescence, or abstinence from seeking legal redress, to be adversely binding, must be based upon the knowledge of the party whose rights will be affected by the act done or omitted to be performed. When full cognisance can be shewn, acquiescence will have, both at law and in equity, the same effect, and be equally binding, as an original express contract. To produce this result, however, clear evidence must be adduced that the party had full knowledge of the fact, upon which the supposed adoption and recognition are founded. Hence, the doctrine does not apply where the parties are acting under a misapprehension or common error; (2 Meriv. 362); but lapse of time and acquiescence may be a bar to equitable relief, even against mistake or fraud; (*Selsey* v. *Rhodes*, 2 Sim. & Stu. 41; S. C. 1 Bligh, N. S. 1); or it may exclude an heir at law, by preventing him disputing a testator's will. (*Tucker and others* v. *Tucker*, M'Clel. 424; S. C. 13 Price, 119). In a case where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by an act of parliament, it was holden not competent for the shareholders to impeach such agreement in respect of the public interest. (*Gray* v. *Chaplin*, 2 Russ. 126). Acquiescence will be ineffective where circumstances of undue influence and oppression on one side and distress on the other can be shewn. (*Purcell* v. *Macnamara*, 14 Ves. 106, 121, 122). Where arbitrators are empowered to choose an umpire, and, having differed in their nominations, make the appointment by lot, and then inform the litigating parties that they have mutually chosen A. B. to be umpire, and the parties thereupon assent to the choice, neither party is bound by such acquiescence, if given in ignorance of the real state of facts. (*In the matter of Greenwood and another*, 9 A. & E. 699). *See post, tit.* "*Arbitration.*" As to acquiescence, by lying by and suffering an act to be done, see *Doe* v. *Pye*, 1 Esp. 364; *Neale* v. *Parkins*, 1 Esp. 229; *Saunders* v. *Smith*, 3 My. & C. 711; S. C. 16 L. J. 227; and 3 Taunt. 78.

**Acquittance.** See tits. *Composition with Creditors—Payment —Receipt—Release.*

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**Act of Bankruptcy.** See tit. *Bankrupt.*

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**Act of God.** See tits. *Accident—Carrier—Conditions—Contract—Coroner—Covenant.*

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**Act of Parliament.** See tit. *Statute.*

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## Actionem Non.

Reg. Gen. 9, H. T. 4 W. 4 (1834).

In a plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of "precludi non," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in the maintenance of the whole action, provided that nothing herein contained shall extend to cases where an estoppel is pleaded.

The allegation of actio non in pleading is no longer requisite when pleading in bar to the cause of action, and not to its further maintenance*.

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Weeding *v.* Aldrich, H. T. 1839. K. B. 9 *A. & E.* 861; S. C. 1 *P. & D.* 657.

This was an action of trover for two deer. Plea, as to one deer, that the defendant was possessed of a close; and, because the deer was wrongfully on the same close, *doing* damage, the defendant seized and took it as a distress damage feasant. The plea concluded with a verification.

The Queen's Bench

On demurrer, because the plea had no commencement with actionem non, nor any prayer of judgment, though it was pleaded to part—

It was contended, that the Court of Exchequer had decided, in

* The above rule was at first misunderstood, and was thought to have drawn a distinction between pleas pleaded to the whole cause of action and those pleaded to part; whereas, its only object was to prevent unnecessary verbiage; and the distinction it draws is between pleas in bar of the action and pleas to the further maintenance. The mistake arose from the use of the word "whole," and yet, from the words, "unless otherwise expressed," in the latter part of the rule, it clearly appears to have been the intention, that pleas to a part of the declaration should simply state that they were pleaded "as to so much." The point is now settled. (See *Putney* v. *Swann*, abridged post, 54; *Penrose* v. *Neck*, 2 H. & W 178).

*Putney* v. *Swann*, (2 M. & W. 72, infra), that the new rule only requires the form of the actionem non to be *adopted*, where the plea is in bar, not of the whole action, but of the further maintenance of it.

*And by the Court.*—We agree in the decision of the Court of Exchequer, and think the actionem non and prayer of judgment unnecessary.

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PUTNEY *v.* SWANN, M. T. 1836. Ex. 2 *M. & W.* 72; S. C. 5 *D. P. C.* 296.

and Exchequer decided that the actionem non need only be stated where the plea is pleaded in further maintenance of the action*;

IN assumpsit, the declaration contained one count on a bill of exchange and on an account stated. Plea, that the defendant did not accept the bill of exchange. On demurrer, on the ground that the plea purported to answer all the declaration, when it only answered part, it was contended, it must be considered as answering the whole declaration, because it contained no actionem non.

*Sed per Cur.*—The meaning of the 9th rule of H. T. 4 Will. 4, is, that the actionem non shall be introduced where the plea is pleaded in *further maintenance* of the action, and not to a plea in bar, like the present.

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UPWARD *v.* KNIGHT, H. T. 1839. C. P. 5 *Bing. N. S.* 338; S. C. 7 *Scott*, 311.

but the Common Pleas held, that a plea to part only of the plaintiff's demand, ought to commence with an actionem non, whether in bar or only against the further maintenance of the suit;

To a declaration in assumpsit, one plea was as to 10*s.*, parcel, &c., that it was for the sale of spirituous liquors. On demurrer, on the ground that the plea being pleaded to a part only of the cause of action, it did not commence with the allegation of actionem non, or conclude with a prayer of judgment.

In support of the demurrer, it was contended, that all pleas pleaded without such formal parts should be taken, unless otherwise expressed, as pleaded in bar of the whole action. And therefore, in *Bird* v. *Higginson*, (infra), where a prayer of judgment was held unnecessary in a plea applying to one count only, the plea applied to the whole cause of action in that count: here the plea applied only to a part of the cause of action. On the other side it was argued, that, as the plea was not against the further maintenance of the action, such allegation was unnecessary; because the rule only applied where a plea is against the further maintenance of an action, or any part of it.

*Sed per Cur.*—A plea is to be deemed as pleaded to the whole action, unless otherwise expressed: it is not otherwise expressed here. But the defendant may amend.

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BIRD *v.* HIGGINSON, E. T. 1837. K. B. 6 *A. & E.* 824, in error; S. C. 2 *Id.* 697; S. C. 4 *N. & M.* 505.

and before the preceding cases, a plea answering the whole of the count to

THE declaration contained several counts, alleging that plaintiff agreed to grant and let, and defendant to take, a messuage at D., in the parish of M., with exclusive license to shoot and sport over the manor of D. in the parishes of M. and L., and to fish in the waters

* So, if a plea be pleaded in total bar of a particular part of a count, it is not requisite in a replication, replying specially to it, to commence with the formula of precludi non, or conclude with a prayer of judgment. (*Phillips* v. *Roderick*, Ex. 1838. MS., quoted 7 Scott, 313).

thereof during the term; to hold the messuage, right, liberties, and premises, for the term, at a rent; and that plaintiff let the messuage, right, liberties, and premises to defendant, who entered into and upon the same, and became and was possessed thereof for the term: breach, non-payment of rent. To this declaration defendant pleaded several pleas, each plea *answering* one count only, and containing no actionem non, or prayer of judgment. On error, it was contended, that the rule H. T. 4 Will. 4, dispensing with the statement of actionem non and prayer of judgment, only applied to cases where the plea is in bar of the action generally, and not to a case where the plea is pleaded to one of several counts. But the Court overruled the objection, and *Tindal*, C. J., said—The count certainly contains the whole action, in the sense of the rule.

which it is pleaded, did not require the actionem non.

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## Actio Personalis moritur cum Persona*. See also tits. *Abatement—Executor and Administrator.*

* It was a principle of the common law, that if an injury was done either to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person to whom the wrong was done: thus, where the action was founded on any malfeasance, or misfeasance, as a tort, or arose ex delicto, such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting watercourse, obstructing lights, escape, and many other cases of the like kind, where the declaration comprises a tort done either to the person or the property of another, and the plea must be, not guilty, the rule was actio personalis moritur cum persona. But this rule has received considerable modification. By the statute 4 Edw. 3, c. 7, de bonis asportatis in vita testatoris, which, reciting that, in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life; and so as such trespasses have remained unpunished, enacts that the executor in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were living. And this remedy is further extended to executors of executors, by statute 15 Edw. 3, c. 5; and to administrators, by an equitable construction of the former statute; Cro. Eliz. 314. The act 4 Edw. 3, being a remedial law, has always been expounded largely; and though it makes use of the word "trespasses" only, has been extended to other cases within the meaning and intent of the statute (1 Vent. 187; W. Jones, 174); but the act does not extend to injuries done to the person or to the freehold of the testator; (1 Saund. Rep. 217 *a*, n. 1); nor for a breach of a promise of marriage to the deceased, where no special damage to the personal estate can be stated on the record. (2 M. & S. 408). But now, by the 3 & 4 Will. 4, c. 42, s. 14, it is enacted, "that an action of debt on simple contract shall be maintainable, in any court of common law, against any executor or administrator;" and, by the second section of the same act, after reciting "that there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased, in his lifetime, to and in respect of his property, real or personal, for remedy thereof," it is enacted, "that an action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six

# Actions*.

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X. OF NOTICE OF ACTION. See tit. *Action, Notice of,* p. 79.

XI. OF BRINGING ACTION BEFORE THE RIGHT HAS LEGALLY ACCRUED, p. 78.

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calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." (*See Chamberlain* v. *Williamson*, 2 M. & S. 408).

* An action lies for every infraction of a party's legal right, whether arising out of breach of contract or occasioned by a tortious wrong—provided the civil remedy be not suspended or merged in the higher claim of the public, to have the law itself vindicated by the punishment of the offender. It is, therefore, not only of essential importance that the appropriate forms of action should be strictly adopted, for a mistake in this respect is always fatal, and obliges the party complaining to resort to a fresh action, but to ascertain whether redress is to be sought through the agency of a civil suit or a criminal prosecution. Thus, if an injury be merely public, the remedy can only be public, and no particular individual can proceed for private compensation for the supposed wrong he has individually sustained; for, otherwise, many individuals would sue separately, and there would not only be a multiplicity of suits (which the law discourages), but, as each individual would be content to receive or recover his private compensation, the general interest of the community would be disregarded, and the wrongdoer be inadequately punished. For this reason, in general, the remedy must be by indictment or criminal proceeding for a nuisance to, or for not repairing, a public highway or bridge, or other offence affecting a public right. (2 T. R. 667; 11 East, 349.) So, in cases of felony, the remedy by action, for the private

## I. OF THE PARTIES TO, IN GENERAL.*

GIBSON *v.* WINTER, M. T. 1833. K. B. 5 *B. & Ad.* 96; S. C. 2 *N. & M.* 737.

A person suing merely as a

ACTION of covenant by the plaintiff as a broker, who had effected a policy in his own name. He now sued at the instigation of his

injury, is *suspended* until the party particularly injured has fulfilled *his duty* to society by prosecuting the offender for the public crime. And for homicide, all civil remedy is entirely merged in the felony. Hence, no action is sustainable for the battery of a wife or servant, whereby death ensues. (Styles, 647). The civil remedies (Styles 647; Yelv. 89) being suspended, in consequence of a felony, there is no redress against the offender before convicting him at law or in equity (17 Ves. 331); but after conviction and punishment, on an indictment of the party for stealing, the person robbed may support trespass or trover against the accused; and after an acquittal of the defendant, upon an indictment for a felonious assault and stabbing, the prosecutor may maintain trespass to recover compensation for the civil injury, if it be not shown that he colluded in procuring the acquittal. (12 East. 409). In some cases of misdemeanors, and other particular offences, there are express enactments that the civil remedy shall not be affected by the criminal; as in the case of embezzlements by clerks, bankers, &c. (52 Geo. 3, c. 53).

In the case of a public nuisance, which is merely a misdemeanor, if a particular individual has sustained actual and particular material damage or inconvenience, in consequence of the offence, as if, in throwing a log into a public highway, it hurt an individual, or afterwards occasion his horse to fall; or if a public road, which a private individual was bound to repair, be so impassable as to delay another a long time in his journey, or compel him to take a circuitous route, then the latter may sustain an action for such particular damage (3 B. & Adol. 77; Willes' Rep. 71); and he may, at the same time, prosecute the offender, by indictment, for the public nuisance. So, some injuries are in their nature as well private as public, as assaults and batteries, libels on individuals, and forcible entries; and the party particularly injured may proceed by action; or he, or any other person, may indict the wrong-doer for breach of the peace; and, in general, the civil remedy for a private injury, also constituting a public misdemeanor, is not, as in cases of felony, even suspended.

A party cannot abate a private nuisance and also sue for damages. (*Baten's case*, 9 Co. 55; 3 Black. C. 219, 220; see vide 1 Rol. Ab. 5, pl. 1; *Baldwin* v. *Cole*, 6 Mod. 212). But it is no objection to an action that an injunction has been obtained to prevent further injury, (*Attorney-General* v. *Nichol*, 3 Mer. 687), though the rule is otherwise with respect to bills for specific performance; for although a vendor and vendee, respectively, have the option of proceeding at law or in equity, (Sugd. V. & P. 205), he cannot at both; and after a decree for a specific performance against a defendant, the plaintiff cannot proceed by action at law on the contract for damages; and such action might be restrained by injunction. (6 Mad. Eq. 290). But if a purchaser, after a bill filed for a specific performance, pay the purchase-money without putting in his answer, and afterwards discover a fraud in the sale, he is not precluded from bringing an action for damages, if he come recently after discovering the deception. (*Jenwine* v. *Slade*, 2 Esp. N. P. 572).

To a right of action it is essential that the damage sustained be the necessary consequence of the defendant's misconduct, and not the effect of the plaintiff's own negligence (*Flower* v. *Adam*, 2 Taunt. 314), or produced by the wrongful act of another, not the defendant. (*Vicars* v. *Wilcocks*, 8 East. 1). Nor can an action arising out of a breach of duty be sustained (*Pitcher* v. *Bailey*, 8 East, 171); nor is it maintainable when the plaintiff has no interest which the law can recognise. (*Lapierre* v. *M'Intosh*, 9 A. & E. 857).

It is, however, no objection to an action, that it be new in the *instance*, if it be not new in its *principle*. (*Pasley* v. *Freeman*, 3 T. R. 63; *Chamberlain* v. *Williamson*, 2 M. & S. 415).

* Under this division only those cases are abridged and referred to which could not be conveniently introduced under some specific alphabetical title. The following are the general rules upon the subject of parties to suits:—

1st. As regards who are to be *plaintiffs* in actions on *contract*. The action on a contract, whether express or implied, or whether by parol or under seal, or of record,

trustee for another, must be deemed in all respects as the party to the cause; and that which defeats the action as regards him, defeats it as regards the cestui que trust*.

principal. After the loss, it appeared the defendant settled with the broker, by allowing him credit for premiums due. The Court held, that, as against the party to the record, it was to be deemed a good payment, and an answer to the action; a party suing in a court of law, although merely as a trustee for another, must be treated in all respects as the party in the cause; and a defence against him is a defence against a cestui que trust, who sues in his name.

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WHITTINGHAM *v.* BLOXHAM, T. T. 1831. N.P. 4 *C. & P.* 597.

The possessor of a chattel may maintain an action for injury done to it, though only the

A PERSON of the name of P., being the owner of a shop and goods, allowed the plaintiff to be at the shop, and, in his own name, to sell and dispose of the goods as he pleased; and a portion of these goods being destroyed by the negligent driving of the coachman of B., while the servant of plaintiff was carrying them, *Patteson*,

must be brought in the name of the party in whom the LEGAL interest in such contract is vested. (1 East, 497; 8 T. R. 332; 1 Saund. 153, n. 1; 7 Mod. 116; 2 Saund. on Uses and Trusts, 222; 2 T. R. 693; 7 T. R. 667; and see 2 Bing. 20). Courts of common law have no cognisance of equitable rights, as contra-distinguished from the strict legal title, so as to invest the equitable or beneficial claimant with the ability to adopt legal proceedings in his own name, although the equitable right may embrace the whole beneficial interest to be derived from the contract or subject-matter of litigation. This rule could not be disregarded without destroying the fundamental distinction between the Courts of common law and the Courts of equity, with regard to the remedy peculiar to each jurisdiction.

2nd. As regards who are to be *plaintiffs* for *wrongs or torts*. The action for a tort must be brought in the name of the person whose legal right has been prejudiced, and who was legally interested in the property at the time of the injury committed. A cestui que trust, or other person having only an equitable interest, cannot sustain an action against his trustee or against a third person, unless where the action is against a mere wrong-doer and for an injury to the actual possession of the cestui que trust. (1 East, Rep. 244; 2 Saund. 47 *a*).

3rd. As regards who are to be *defendants* in actions on *contracts*. The action upon an express contract, whether it be by deed, or merely in writing, or by parol, must, in general, be brought against the party who made it, either in person or by agent; and although in the case of a deed inter partes, an individual not named as a party cannot sue thereon, notwithstanding it contain a covenant with him and for his benefit, yet this rule does not protect from liability a party who executes such a deed containing a covenant by him, although he is not described as a party thereto. And a party who expressly contracts and permits credit to be given to him, is liable, although he were not the strict legal owner of the property in respect of which the promise is made.

4th. As regards *defendants* in actions for *wrongs or torts*. In personal or mixed actions in form ex delicto, the person committing the injury, either by himself or his agent, is to be made the defendant. All persons are liable to be sued for their own tortious acts, unconnected with or in disaffirmance of a contract. Therefore, although an infant cannot in general be made a party in an action in form ex contractu, except for necessaries, he is liable for all torts committed by him, as for slander, assaults and batteries, &c., and also in detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return. But a plaintiff cannot, in general, by changing his form of action, charge an infant for a breach of contract, as for the negligent or immoderate use of a horse, &c.; nor can he be a trespasser by prior or subsequent assent, but only by his own act. A married woman is liable for torts actually committed by her, though she cannot be a trespasser by prior or subsequent assent. And although a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit. With regard to the liability of corporations, it is a clear general rule that they are liable to be sued as such, in case or trover, for any torts they may cause to be committed.

* A cause must always be decided as if the parties on the record were the persons really interested. (*Caldwell* v. *Ball*, 1 T.R. 205; *Doe* d. *Byne* v. *Brewer*, 4 M. & S. 300.)

J., held, that the plaintiff had such a qualified property in these goods as would entitle him to maintain an action on the case against B.

ostensible and not the actual proprietor.

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GARDINER *v.* DAVIS, T. T. 1825. N. P. 2 *C & P.* 49.

*Per Abbott*, C. J.—The question here is, with whom was the contract made; and not to whom did the business belong. For if a person allow another to trade in his own name, and to hold himself out to the world as carrying on the business, a payment to that other would be a good bar to an action brought by the person for whom the trade was really carried on. And the person ostensibly carrying on the trade is, by law, entitled to recover for goods sold in the course of that trade, unless the person so suffering him to carry on the trade interfere by asserting his or her right to the sum due.

So may an actual contracting party sue, though not the owner of subject-matter to which it relates.

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BURLS *v.* SMITH, T. T. 1831. C. P. 5 *M. & P.* 735; S. C. 7 *Bing.* 705.

THE defendant was a member and one of the committee of the Western Hospital, an eleemosynary establishment, set on foot and supported by voluntary contributions. The affairs of the hospital were conducted by a committee appointed by the subscribers at large, which the defendant frequently attended, and over which he sometimes presided. And at a meeting at which the defendant was present, the steward of the hospital produced his balance-sheet, on which was the plaintiff's name and the amount of his demand. In an action for goods sold, against the defendant, it was contended, that if a member of the committee, who is not proved to have given the order, be held liable, the subscribers must be equally so; and such a decision will be fatal to these institutions. *Tindal*, C. J., directed the jury to say whether the defendant had acted in such a manner as to induce the plaintiff to believe that he was to look to him and the committee-men for payment; and the jury having found a verdict for the plaintiff, the Court refused a new trial on that ground.

A committee of management, giving directions at an hospital supported by subscriptions, are personally liable;

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GLENESTER *v.* HUNTER, T. T. 1831. N. P. 5 *C. & P.* 62—S. P. PINK *v.* SCUDAMORE, *Id.* 71.

ACTION for goods sold. The defendant, a member of a committee of management, taking an active part in the concerns of a charitable institution supported by voluntary contributions, was sued for goods furnished by plaintiff for the use of the institution. It appeared that plaintiff did not furnish them on any contract with the committee; but, having at first furnished goods on the credit of an individual, who, previously to the formation of a committee, had the sole management, continued to send them in afterwards on orders given by the servants of the institution, without any inquiry as to who was liable.

*Tindal*, C. J., left it to the jury to determine with whom the contract was made for the purchase and delivery of the goods; and whether the committee did so conduct and hold themselves out as the managers and employers of the persons who gave the orders,

even if the goods were ordered by the servants in their employ, and no individual contract made with the defendants, —qu.*

* See also tit. "*Joint Stock Company.*"

as that any tradesman at the time, knowing this, might reasonably conclude that he was supplying his goods on their credit.

*See tits. Club—Joint Stock Company.*

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FROST *v.* BOLLAND, T. T. 1826. K. B. 5 *B. & C.* 611; S. C. 8 *D. & R.* 384.

Authority given to committee by a paving act to sue, on the decease of their clerk, for the recovery of any penalty, rate, or other sum due or payable, enables them to bring other actions than for penalties, &c.

A LOCAL paving act provided, that in case the treasurer, collector, officer, or other person, should die or become bankrupt, having money of the commissioners in his hands, the commissioners should have a priority of claim, and that their clerk should sue in his own name for the recovery of any penalty, rate, or other sum due or payable by any person. The Court held, that it did not restrict them from suing in the name of their clerk for mere penalties and rates, but that they might sue the assignees of their bankers for the amount of monies in their hands.

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TRUWHITT *v.* DEPREE, H. T. 1827. N. P. 2 *C. & P.* 557.

A party so authorized need not prove that the action is brought with the sanction of the public body whose servant he is.

BY a private act, the committee for paving the Savoy Precinct are empowered to sue and be sued by their clerk. The plaintiff sued in this capacity and proved his appointment, but did not shew that the commissioners had authorized the action. Lord *Tenterden* ruled that it is for the defendant to show that the action had been brought without their sanction.

*See Doe* v. *Spencer*, 2 *C. & P.* 79, *and post, tit. Insolvent.*

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DANIELS *v.* POTTER, H. T. 1830. N. P. 4 *C. & P.* 262.

The owner of a cellar door, properly fastened, is not liable for the act of a party, not under his control, who improperly occasioned its falling on the plaintiff.

THE plaintiff was waiting near defendants' premises for an opportunity of crossing over to go to D., where he lived, when the flap of a cellar under defendants' warehouse, (into which the other three defendants, two of them being wine-coopers and one a porter, were letting down a hogshead of wine), fell upon him and broke one of his legs. The flap was placed, in a slanting position, on a projecting ledge, about a foot above the pavement; it was not fastened in any way, but leaned partly against the window of defendants' warehouse and partly against that of his next-door neighbour.

*Tindal*, C. J. (in summing up), said—"The defendants were bound, in placing the flap, to use such precaution as would preserve it, under all ordinary circumstances, from falling down; but if it was so secured, and a third person, over whom they had no control, came and removed it, then, I think the defendants will not be liable. The plaintiff says that the flap fell in consequence of the negligence of the defendants. The defendants' case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff; and your verdict will be for the plaintiff or defendants according as you believe the one or the other of these stories."

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LAUGHER *v.* POINTER, T. T. 1826. K. B. 5 *B. & C.* 547; S. C. 8 *D. & R.* 556.

It has been questioned whether a person, using his own carriage

IN an action on the case for an injury received by a horse of the plaintiff's, in consequence of the careless and negligent driving of the defendant's coachman, it appeared that the defendant, a country gentleman, had hired a pair of horses and a coachman from a livery

stable-keeper, to take his carriage into the city. The defendant's counsel, on this, contended, that there was not such a relationship of master and servant as would render the defendant liable for the acts of the driver. The Lord Chief Justice admitted the force of the objection and directed a nonsuit, with leave to move for a new trial.

and hiring a pair of horses and a job coachman for the day, is liable for the negligence of the latter.

The Judges being divided in opinion, no judgment was entered on the postea.

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SMITH *v.* LAWRENCE, E. T. 1828. K. B. 2 *M. & R.* 1.

THE defendant was a livery stable-keeper, and on the day when the accident in question occurred, had let out to A. four post-horses, which he sent to his house with two of his postillions. The horses were hired for the day, for the purpose of drawing A.'s carriage to Epsom races and back, which they did, being driven and managed entirely by the defendant's servants. On their return, the defendant's servants drove against the plaintiff's gig and occasioned the damage complained of. The plaintiff obtained a verdict.

It seems now to be settled, that he is not responsible, at all events, where he has no control over the driver or postillion *.

On a motion to set aside the verdict, *Laugher* v. *Pointer* (supra), was cited, when *Bayley*, J., said—This is a somewhat different case from that. The horses there were job-horses, here they are post-horses, which in point of law, I conceive, are taken never to be out of the possession of their actual owner, and over which, therefore, the hirer has no sort of control.—*Rule refused.*

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LEFEVRE AND ANOTHER *v.* BOYLE, T. T. 1832. K. B. 3 *B. & Ad.* 877.

THE plaintiffs were trustees of an insurance company. The policy was by deed on the life of annuitants, and was executed by the plaintiffs; and by it the responsibility of the trustees was limited to the amount of the funds of the company. It was afterwards transferred to the defendant. In February, 1829, A. B. died; the money due on the policy was paid to the defendant by a check drawn by the trustees upon their bankers, and the defendant gave the following receipt indorsed on the policy:—"Received of the trustees to the Promoter Life Assurance Company the sum of 850*l.*" The policy was afterwards discovered to be void, on account of fraud, and the company, by a letter written by their secretary, applied to the defendant to refund the money he had received.

Trustees of a public company may sue for money fraudulently obtained by defendant in payment of a check drawn by the parties on behalf of the company.

In an action for money had and received, it was objected at the trial, that, the company not having been incorporated, the action ought to have been brought in the names of all the members. Lord *Tenterden* directed a verdict for the plaintiffs, but reserved liberty to move to enter a nonsuit. On motion for that purpose—

*Per Cur.*—The funds of the company are vested in them, an account is kept in a banking-house in their names, and the sum paid to the defendant was out of monies invested, in the plaintiffs' names, with those bankers. The defendant has, by his receipt, acknowledged that he received the money due on the policy from the trustees of the company. Then, if this money may be recovered back, the trustees must be the proper persons to sue.

* Or, whenever the driver is the servant of the owner of the horses, unless under circumstances of a special character. *Quarman* v. *Burnett*, E. T. 1840. 6 M. & W. 499. Abridged, *post tit.* "*Driving.*"

ALLEN *v.* WALDEGRAVE, E. T. 1818. C. P. 8 *Taunt.* 566; S. C. 2 *B. Moore,* 621.

Where a statute gives an action against the clerk of the peace of a county, with a power to reimburse himself, a plaintiff cannot sue justices who have covenanted that they or the treasurer shall pay.

BY an act of parliament the justices at the quarter sessions assembled, or at any adjournment, were empowered to build or cause to be built, a bridge; and it was enacted that they might contract for the building of the same, and that every contractor for such work should give sufficient security for the due performance of his contract, to the clerk of the peace, and that the said justices, at any general quarter sessions or adjournment of the same, might appoint such of the justices as they should think fit to superintend the building, &c. The expenses were to be provided for out of the county-rate; and it was enacted, that in all actions or proceedings at law the said justices might sue, or be sued, in the name of the clerk of the peace; and that no actions should abate by the death of any such clerk, but that the clerk of the peace for the time being, should always be deemed the plaintiff, defendant, or respondent, &c. in all such actions, &c. or proceedings at law respectively; and it was provided that every such clerk of the peace should be reimbursed all damages, &c., and expenses which he should have paid or be subject or liable to on account thereof, out of the money to be raised by virtue of the act. The plaintiff covenanted with the defendants, who were the superintending justices, and were described in the indenture as the major part of the justices assembled at the general quarter sessions, to build the bridge, and the defendants covenanted that they or the treasurer for the county should pay him a certain sum of money by instalments. The plaintiff having declared in covenant against the defendants for the non-payment of two instalments, it was determined that the defendants were not liable, and that the remedy given by the statute was against the clerk of the peace.

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CURLING *v.* JOHNSON, T. T. 1833. C. P. 10 *Bing.* 89.

Plaintiff cannot sue, as clerk of a public body, for work done by him in his private capacity, though the business was in connexion with duties attached to his official appointment.

THE plaintiff, as clerk to certain commissioners, authorized to contract under seal and to sue by their clerk, entered into a contract with the defendant for executing certain works, and to pay the expenses of such contract, for which latter, the defendant having refused to pay them as exorbitant, the plaintiff brought the action, as clerk to the commissioners: the Court held, that the action was not maintainable, the commissioners never having executed the contract which the plaintiff had prepared, although ready so to do. The plaintiff could not resort to his public capacity to recover for a claim for work done in his private character, and in which he had debited the defendant in his bill delivered.

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## II. OF THE NUMBER OF PARTIES TO ACTIONS. See also *Misjoinder—Non-joinder—Partners.*

COTHAY *v.* FENNELL, E. T. 1830. K. B. 10 *B. & C.* 671.

All parties legally interested in the perform-

IN an action on a contract for the sale of goods by A., B., and C., it appeared that A. carried on business in London, B. at Glasgow, and C. at Manchester; these three firms had agreed to be inter-

ested in the purchase, but that A. should be the actual purchaser; and he gave the order, and the broker knew him only. Upon this it was contended that A. alone could sue upon the contract so made. Lord *Tenterden* overruled the objection, and the plaintiff had a verdict.

ance of a contract, may join in acting upon it, though effected by an agent apparently for one party only.

On motion for a new trial, the Court refused it, saying, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made.

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LEE *v.* NIXON, E. T. 1834. K. B. 3 *N. & M.* 441; S. C. 1 *Ad. & E.* 201.

THIS was an action of assumpsit brought by one of the trustees of a turnpike-road (under 7 Geo. 4, c. 74) against the lessee and his surety, to recover part of the rent which had been left unpaid by Nixon, the principal.

Where interest in a contract is clearly joint, although the promise in terms is several, both parties may be sued; yet, where one is liable as principal, and the other as surety, they can only be sued separately.

It appeared, that the agreement for letting the tolls was signed by one only of two clerks, who were in partnership as attornies, and the undertaking by the defendants ran in the following terms:—"And the said John Nixon, as farmer or renter of the tolls, and the said Robert Davison, as his surety, do hereby severally promise, undertake, and agree," &c.

The Court held, that the word "severally," must be taken in the common acceptation, unless there is anything to show that it was used in a contrary sense. Considering that the parties here were principal and surety, it is more in the nature of things that this should be a several than a joint undertaking.

*See Alexander* v. *Barker*, 2 *C. & J.* 133; 2 *Tyrw.* 140.

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BREMRIDGE AND ANOTHER *v.* CAMPBELL, M. T. 1831. N. P. 5 *C. & P.* 186.

ACTION for money paid, &c. The plaintiffs, being two electors, obtained from bankers an undertaking to honour their checks. *Tindal*, C. J., held, that although such checks were signed only by one, yet, if there was a bonâ fide joint fund of credit and an adoption by the defendant of the payments made by the plaintiffs to electors in his behalf, the action in their joint names for money paid was sustainable.

A joint fund of credit will enable parties applying this fund to the use of another to sue jointly.

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BARRETT *v.* COLLINS, E. T. 1825. C. P. 10 *B Moore*, 446.

THIS action had been brought, and a verdict obtained, by two plaintiffs against a defendant for a malicious arrest; the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them. The Court ordered the judgment to be arrested, observing, that what one man suffers from

An action cannot be maintained jointly by two plaintiffs, where the wrong done to one is no wrong to the other*.

* But where A. being appointed the managing director of two companies, who had power to sue in his name, ordered a stove to be put up in his house, in which the business of the two companies was carried on at their joint expense; the Court held, that, for a breach of that contract, he might sue for damages, and describe himself as their managing agent. (*Beaumont* v. *Sylvester*, MS.) Judgment by default by one of several co-partners does not preclude other defendants from objecting that too many have been joined. (*Elicot* v. *Morgan*, 7 C. & P. 334.)

such a cause may be altogether different from the injury that may accrue to another from the same cause. And it is a rule of law, that where two have a joint interest, they may join in the same action; but that they cannot do so where the wrong done to one is no wrong done to the other, as in the case of false imprisonment or assault and battery.

## III. OF THE REMEDY BY ACTION, AND WHEN OR WHEN NOT AVAILABLE.

### Douglas v. Forrest, E. T. 1828. C. P. 4 *Bing.* 686.

An action may be maintained here on a Scotch decree, although the debt may have been contracted in Scotland, and the defendant had no notice of the proceedings,*—qu.†?

This was an action brought by the assignees of Stein & Co. bankrupts, against the executor of the will of John Hunter. On the 31st of May, 1799, the testator acknowledged himself to be indebted to Stein & Co. in the sum of 447*l.* 6*s.* 3*d.*, and on the 11th June in the same year he acknowledged that he owed 75*l.* to Robert Smith, one of the bankrupts, and one of the firm of Stein & Co. These debts were contracted in Scotland, of which country the deceased was a native, and in which he had a freehold estate. Shortly after the year 1799 the deceased went to India. He died in India in 1817, having never revisited Scotland. On the 25th of February, 1802, two decrees were pronounced in the Court of Session in Scotland against the deceased; one at the instance of Stein & Co. and the other at the instance of Robert Smith. In the first of these the deceased was ordered to pay to Stein & Co. 447*l.* 6*s.* 3*d.* with interest from the —— day of ———. In the second decree the deceased was ordered to pay Robert Smith the sum of 75*l.* with interest from the —— day of ———. It appeared from these decrees that the deceased was out of Scotland at the time that the proceedings were instituted in these causes. He never had any notice of these proceedings. The decrees stated that the deceased had been, according to the law of Scotland, summoned at the Market Cross at Edinburgh, and at the pier and shore of Leith. A Scotch advocate proved that, by the law of Scotland, the Court of Session might pronounce judgment against a native Scotchman who had freehold property in that country for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time after such proclamations as were mentioned in these decrees had been made. The same witness proved, that a person against whom such a decree was pronounced might, at any time within forty years, dispute the merits of such

* The first count of a declaration in assumpsit was on a bill of exchange drawn by the plaintiffs upon and accepted by the defendant in Scotland.

The second count, after stating the drawing and acceptance of the bill, (which was more than six years before the commencement of the action), set forth at length the making and registering of a protest for non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poinding on the defendant, charging him to make payment of the amount of the bill and interest to the plaintiffs according to the law of Scotland, and his default thereto; and alleged, that, by virtue of the several premises the defendant became liable to pay the plaintiffs the amount of the bill with interest, and, being so liable, promised to pay the same:—Held that this latter count did not disclose a sufficient cause of action as upon a judgment in Scotland. *Hay* v. *Fisher*, 2 M. & W. 722.

† See 9 East, 192; 3 Ves. 170; 5 Id. 276; 2 B. & Ad. 951; Henry on Foreign Law, cc. 8, 9, 10; Story's Com. 454.

decree, but that after the expiration of forty years it was conclusive against him and all who claimed under him.

*Per Cur.*—If these decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them. But we think that these decrees are perfectly consistent with the principles of justice, or we should condemn the proceedings of some of our own Courts. If a debt be contracted within the city of London, and the creditor issue a summons against the debtor, to which a return is made, that the debtor hath nothing within the city by which he may be summoned, or, in plainer words, hath nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and unless the debtor appear within a year and a day, and disputes his debt, he is for ever deprived of his property or the debt due *to him*.

In such cases the defendant may be in the East Indies whilst proceedings are going on against him in the Court in London, and may not know that any such proceedings are instituted. Instead of the forty years given by the Scotch law he has only one year given to him to appear and prevent a decision that finally transfers from him his property.

*See* 1 *Stark*, 525; 1 *Campb.* 63; *Ersk. Inst. B.* 2 *tit.* 5, *s.* 55.

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HENLEY *v.* SOPER, E. T. 1828. K. B. 8 *B. & C.* 16; S. C. 2 *M. & R.* 153.

or upon a decree of a colonial Court of equity.

ACTION of assumpsit on a decree in the Supreme Court at Newfoundland. The plaintiff and defendant had been engaged in a partnership concern at Newfoundland. The plaintiff was resident at that island, the defendant at Plymouth. The partnership was dissolved, and the defendant's son acted under a power of attorney from the defendant; the terms of which were to act on his behalf, and to appoint another, if necessary. The accounts, with the consent of the plaintiff and the defendant's son, were submitted to arbitration under an order of the Court, and an award was made, finding a balance in favour of the plaintiff.—Verdict for plaintiff.

*Per Cur.*—The verdict is right. There is a great difference between colonial Courts and the Courts of this country. The former cannot enforce their own decrees here. A Court of equity in this country can enforce its decrees, and therefore requires no interference of Courts of law.

*See Carpenter* v. *Thornton*, 3 *B. & A.* 52, *where it was holden that an action at law is not sustainable on a decree in an English Court of equity; and* 2 *H. B.* 248, 410; 4 *Taunt.* 705; 1 *Doug.* 1.

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BIDDELL *v.* DOWSE, H. T. 1827. K. B. 9 *D. & R.* 413; S. C. 6 *B. & C.* 255.

An action at law cannot be sustained upon an order of the Court of Chancery directing a submission;

ALL matters in difference between parties to a suit in equity, some of whom were infants represented by their next friends, were referred to arbitration by an order of the Vice-Chancellor, "with the consent of the attornies of the parties in the said suit;" and an action being brought upon the award—

*Per Cur.*—The submission mentioned in the declaration is an order of the Vice-Chancellor, made in a suit pending before him, by

consent of the attornies of the parties in the suit. The order of the Vice-Chancellor cannot be enforced by action.

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JONES *v.* TANNER, M. T. 1827. K. B. 7 *B. & C.* 542; S. C. 1 *M. & R.* 420.

or for the amount of a distributive share of an intestate's effects, though the administrator admits it to be in his possession*.

THIS was an action to recover £83, the amount of the plaintiff's distributive share of the estate of his father William Jones, who died intestate, and to whom Benjamin Jones, the defendant's testator, was administrator, and also to recover 200*l.* alleged to have been due from Benjamin Jones. A verbal promise by Benjamin Jones to pay the amount of the distributive share claimed by the plaintiff was proved, and it was also in evidence that Benjamin Jones had said to the plaintiff, "Well, I had thy 200*l.* but I maintained thee all the while." It further appeared, that the defendant, when applied to as executor on the part of the plaintiffs, referred the person so applying to the other executor appointed under the will, but who had refused to act, but promised that the claim should be settled. A verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

*Per Cur.*—An action cannot be brought for a distributive share. It is not a common-law right, but is given by statute sub modo. The statute shews that an action will not lie for a distributive share, nor will an action lie upon an express promise without a new consideration.

*See Johnson* v. *Johnson*, 3 *B. & P.* 169; *and* 7 *B. & C.* 544.

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BRYAN *v.* LEWIS, 1826. K. B. N. P. 1 *R. & M.* 386.

No action lies on a contract to deliver goods at a future day where the vendor has not the goods, or made any contract for them, or any reasonable expectation of receiving them.

THE plaintiff had agreed to sell certain goods, to be delivered at a future day, having neither the goods at the time, nor having entered into any contract to buy them, nor having any reasonable expectation of receiving them, but intending to go into the market to buy the goods he had so contracted to sell.—It was held, by *Abbott*, C. J., that he could maintain no action on such a contract.

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STONE *v.* MARSH, E. T. 1827. K. B. 6 *B. & C.* 551.

Although a party cannot support an action against a felon and his partners, yet, on conviction of the felon, the impediment is removed as to the partners†;

ONE of three trustees of stock in the funds, being also a partner in a banking-house, under a forged power, effected the sale of the stock, the produce of which was paid by their agent into the house generally, and was never appropriated to any particular account. The Court held, that, although a party cannot sustain an action against a felon, or sue with him, when the claim is founded on the felony of one of the defendants; yet, after the conviction of the felon, the parties who have received the money cannot protect themselves against the demand for it by shewing the felony on the part of one of their members.

* Nor for a legacy, 7 T. R. 350; Cowp. 289. *See ante* "*Account Stated.*" *Post* "MONEY HAD AND RECEIVED."

† For we have seen, in cases of felony, the remedy by action for the private injury is generally suspended (erroneously termed *merged*) until the party particularly injured has fulfilled his duty to the community by prosecuting the offender for the public wrong. (See Noy, 128; Cro. Eliz. 61; 2 T. R. 750; 12 East, 409; 5 T. R. 175; 1 Hawk. P. C. 240).

GIMSON *v.* WOODFULL, E. T. 1825. N. P. 2 *C. & P.* 41.

TROVER against defendant for a mare. Plaintiff proved his former possession of the animal; but, on cross-examination, it appeared that the plaintiff had good reason to believe that it had been stolen from him by the persons who had sold it to the defendant. The plaintiff had been before a magistrate to endeavour to get back the mare, but had taken no measures to bring the thief to justice. *Best*, C. J. nonsuited the plaintiff, observing, that he had gone before the magistrate to get back his property, not to prosecute the felon.

and a party whose property has, according to all reasonable belief, been stolen, cannot sue the purchaser of it, until he has endeavoured to bring the thief to justice.

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WOOLLEY *v.* SCOVELL, M. T. 1828. K. B. 3 *M. & R.* 105.

IN an action on the case, it appeared that the defendant ordered his servants to throw bags of wool out of the window of his warehouse. Before the bag was dropped from the window one of the defendant's servants called out to warn passengers. The plaintiff, who happened to be in the yard, looked up and saw the wool as it was thrust out of the window; he then ran across the yard, thinking, as he afterwards said, that he should have time to escape. The wool, however, fell upon him and he sustained a considerable injury.

*Per Cur.*—The first fault was the throwing of the wool from the window instead of lowering it by the usual mode, by a crane. It is not surprising that the plaintiff should have been alarmed, and should thereby have lost his self-possession; and this alarm was occasioned by the wrongful act of the defendant.

The legal liability affecting negligence cannot be evaded by shewing that the plaintiff lost his presence of mind.

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BLOFELD *v.* PAYNE, H. T. 1833. K. B. 4 *B. & Ad.* 410; S. C. 1 *N. & M.* 353.

A., A MANUFACTURER, uses the mark of B. for the purpose of giving to articles manufactured by A. the appearance of being of the manufacture of B. In an action by B. against A. for the infringement, the Court held that B. may maintain an action against A., although A.'s articles are not inferior in quality to B.'s, and although it is not shewn that B. has sustained actual damage.

*See* 2 *Bing.* 317; 1 *B. & Ad.* 415; 1 *M. & M.* 520; 2 *Wils.* 422.

An action lies for selling articles inclosed in wrappers resembling those used by the plaintiffs.

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IV. OF, WHEN THE REMEDY BY ACTION IS BARRED OR SUSPENDED.—And see tits. *Accord and Satisfaction—Limitations, Statute of—Release.*

GIBSON *v.* WINTER, M. T. 1833. K. B. 2 *N. & M.* 737.

IN this case, *Denman*, C. J., who delivered the judgment of the Court, said, the plaintiff, though he sues as a trustee of another, must in a court of law be treated in all respects as the party in the cause. If there be a defence against him, there is a defence against the cestui que trust, who uses his name; and the plaintiff cannot be permitted to say for the benefit of another that his own act is void, which he cannot say for the benefit of himself.

*See* 1 *T. R.* 205; 4 *M. & S.* 300.

That which destroys the technical legal right to sue in the parties to the record, destroys it as to the parties beneficially interested.

ALLIES *v.* PROBYN, T. T. 1835. Ex. 2 *C., M., & R.* 408; S. C. 4 *D. P. C.* 153.

A written agreement to give a mortgage on land payable by instalments for a pre-existing debt does not suspend the right to sue for the original demand.

To an action of assumpsit, the defendant pleaded that the plaintiff, by agreement with the defendant, in consideration that the defendant would secure the above sum by executing a mortgage of certain premises, when called upon to do so, the amount to carry interest, and to be payable by instalments, undertook that no proceedings in respect of that sum should be instituted against the defendant, unless default were made in payment of the instalments. The defendant then averred that he had been always ready to execute the mortgage but had never been called upon so to do. On demurrer—

*Per Cur.*—There is nothing but a simple engagement to execute a mortgage when called upon to do so. If they never called upon him the defendant could never execute at all; and then the right of action would be suspended during their whole lives. All, however, that the contract amounts to is, that the plaintiffs may have the mortgage if they like; but it is itself not a satisfaction of the previous debt.

*See Simon* v. *Lloyd*, 2 *C., M., & R.* 187.

## V. OF THE FORM OF ACTION.

### (*a*) IN GENERAL.

FERGUSON *v.* CARRINGTON*, H. T. 1829. K. B. 9 *B. & C.* 59; S. C. 3 *C. & P.* 457.

Bringing an action upon a contract affirms it in all its parts, and the party must recover according to its terms, or not at all

ACTION of assumpsit for goods sold and delivered. It appeared that the sale and delivery of the goods were admitted by the defendant, who shewed that they were sold at a certain credit; that the plaintiffs drew upon him certain bills according to the agreed credit, which he accepted, and that the action was brought before either of the bills became due. To get rid of the effect of this evidence, the plaintiffs offered to go into evidence shewing that the purchase by the defendant was fraudulent; that the goods had been obtained under false pretences; and that, shortly after the purchase, he sold the goods at an under price.

*Per Cur.*—The case of *Parker* v. *Patrick*, 5 T. R. 175, was relied upon by the plaintiffs, as shewing that, under the circumstances which they were about to prove, trover for their goods would lie; but it must not be taken for granted that that case is law. It seems to lay down as a proposition, that, where goods are obtained under false pretences, no property passes to the buyer; but it is not necessary, in the present case, to dispose of that question, as here the plaintiffs have treated the whole as matter of contract.

### (*b*) WHETHER ASSUMPSIT OR ACCOUNT†.

* Doubting the authority of *Parker* v. *Patrick*, 5 T. R. 175.

† Assumpsit lies to recover the balance of a banker's account, however voluminous it may be; and the plaintiff is not confined to an action of account. (*Tomkins* v. *Willshear*, 5 Taunt. 431; *Arnold* v. *Webb*, 5 Taunt. 432, n.). See ante ACCOUNT—*action of.*

### (*c*) Whether assumpsit or covenant.

East India Company *v.* Lewis, T. T. 1828. N. P. 3 *C. & P.* 359.—S. P. English *v.* Blundell, 8 *C. & P.* 332.

Assumpsit will not lie where remedy by instrument under seal exists*;

In an action for money had and received, the defendant, as an answer to the action, put in one part of a deed of covenant executed by the plaintiffs, whereby the defendant covenanted to pay over all monies received by him on account of the plaintiffs. Notice having been given to the plaintiffs to produce the counterpart of this deed—

Lord *Tenterden*, C. J., held, that it was presumptive evidence that he had executed the counterpart, and, whether lost or not, the plaintiff was bound to sue on the covenant, and could not maintain an action for money had and received.

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Barber *v.* Harris, H. T. 1839. Q. B. 9 *A. & E.* 532; S. C. 1 *P. & D.* 360.

even where there is only an implied *covenant* between the parties,

Defendant, who was lessee of certain premises, granted and assigned them by indenture to the plaintiff, who, having been distrained upon for rent in arrear to the superior landlord before the agreement, brought assumpsit to recover the money paid under the distress, and relied upon an express promise by defendant to repay it. The Court held, that, as covenant would lie on the implied covenant on the word "grant," assumpsit would not lie on any implied contract to indemnify the plaintiff, nor on the express promise, which was not founded on a new consideration.

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Churchill *v.* Day, M. T. 1828. K. B. 3 *M. & Ry.* 71.

unless there has been an express promise to pay a specific balance;

The plaintiff had contracted by deed to perform certain works, and for extra works at prices to be fixed by a third party, who fraudulently awarded that nothing was due in respect thereof. In assumpsit, as on a simple contract,

Lord *Tenterden* was of opinion, that the plaintiffs must be nonsuited for not having declared upon the agreement under seal.

On motion to set the nonsuit aside, the Court concurred in the view taken by Lord *Tenterden*, C. J., and added, in *Foster* v. *Allanson*, (infra, note), there was an express promise to pay the balance which had been struck; and that is the ground of the action, otherwise the objection would have been good.

* Where there is an express contract by deed, covenant not assumpsit lies on any promise arising by implication of law out of its terms. (*Randall* v. *Lynch*, 12 East, Rep. 179). But if A. covenants with B. to account, which he does, and promises B. to pay him the balance, assumpsit lies by B. upon this promise. (*Moravia* v. *Levy*, 2 T. R. 483). So, where two entered into partnership for a given time, under seal, with a covenant to settle at Christmas every year, and to come to a final settlement, and divide the funds at the expiration of the partnership: they dissolve the partnership before the time has expired, come to a settlement, in which items having no reference to the partnership are included, strike a balance in favour of one, which the other promises to pay:—Held, that, notwithstanding the covenant, assumpsit lay by the former against the latter by reason of such promise. (*Foster* v. *Allanson*, 2 T. R. 479; and see 1 M. & S. 573; *Wray* v. *Milestone*, 5 M. & W. 21).

SCHLENCKER *v.* MOXSY, H. T. 1825. K. B. 3 *B. & C.* 789; S. C. 5 *D. & R.* 747; S. C. 1 *Car. & P.* 178.

As no implied contract can be inferred where there is a deed;

THE tenant of certain premises underlet a part by deed, and his original landlord distrained for rent upon the under-tenant. The Court held, that the under-tenant could not maintain assumpsit against his lessor to recover the money paid under the distress, as a promise cannot be implied where there is a deed.

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BARBER *v.* HARRIS, H. T. 1839. Q. B. 1 *P. & D.* 360.

especially if a covenant can be implied from the language of the instrument under seal.

IN an action of assumpsit, it appeared that the defendant had "granted" and assigned by deed certain premises to the plaintiff; and that the superior landlord having distrained upon the plaintiff for rent due before the assignment, he brought an action to recover the money so paid under the distress, and relied upon an express promise.

But the Court held assumpsit could not lie, as covenant might be maintained on the implied covenant to be raised from the word "grant."

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### (*d*) WHETHER DEBT OR ASSUMPSIT*.

CORBETT *v.* CARPMAEL, M. T. 1833. K. B. 2 *N. & M.* 834.

In suing on a statute—giving "an action of debt or case," assumpsit may be adopted.

THE 47 Geo. 3, c. 82, s. 29, authorizes certain trustees to sue for tonnage, &c., by action of "debt or case." It was objected, that under this act assumpsit had been improperly brought, as the word "case" applied to actions of tort only; but, *per Denman*, C. J., I infer from the act, that "action on the case" means any form of action on the case that may arise.

*See* 7 *T. R.* 36; 1 *Chit. P. C.* 164.

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### (*e*) WHETHER CONTRACT OR TORT†.

LANGRIDGE *v.* LEVY, E. T. 1837. Ex. 2 *M. & W.* 519.

Tort may lie arising out of a

THE declaration stated, that the defendant had sold a gun to the plaintiff's father, with a warranty that it had been manufactured by

* Debt or assumpsit may be supported on any simple contract where indebitatus assumpsit lies. The former is a more extensive remedy than assumpsit, as it is sustainable on agreements under seal as well as simple contracts; but never upon a mere collateral unsealed agreement; as where a debt is payable by instalments, and the whole not due. (*Rudder* v. *Price*, 1 H. Bl. 547; see *Bishop* v. *Young*, 2 B. & P. 78; and 14 East, 571; 2 Smith Rep. 618; 3 Id. 114; 3 Price, 253). Where a stat. gives an action for damages, not specifying the form, if, by calculation, they can be reduced to a certain sum, debt is the proper remedy; but if unliquidated, case. (*King* v. *Marsock*, 6 T. R. 331; *Huddersfield Canal Company* v. *Buckley*, 7 T. R. 36). *See tit.* "*Assumpsit*," as to whether special or indebitatus assumpsit should be adopted.

† When the injurious act of one man deprives another of some benefit he would otherwise have attained, the latter may waive the tort, and sue in form ex contractu. Thus, a master may sue one as for work and labour done by his servant, who, after notice, harbours his servant or apprentice. (*Lightly* v. *Clouston*, 1 Taunt. 112; *Foster* v. *Stewart*, 3 M. & S. 191; *Feltham* v. *Terry*, Lofft. 207). So, on the

a certain maker, and was a safe and secure gun, that he knew it had been purchased for plaintiff's use; that, by its bursting, he had sustained injury, it being of an inferior make, and not according to the warranty. On motion in arrest of judgment, the Court held, that a sufficient cause of action against the defendant was disclosed; the damage being a consequence of the fraud, whilst the instrument was in the possession of a party to whom the defendant's representation was either directly or indirectly communicated, and for whose use he knew that the instrument was purchased.

breach of contract by an individual not a party to the contract, but acquainted with its contents;

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POWELL *v.* REES, M. T. 1837. Q. B. 7 *A. & E.* 426; S. C. 2 *N. & P.* 571.

IN an action for money had and received against an administrator, it appeared that the intestate had worked into his neighbour's land, and dug coal, which he had sold, retaining the proceeds. It was contended on the trial, that the action was not maintainable; but the learned judge overruled the objection, giving the defendant leave to move to enter a nonsuit.

or an action as upon contract may arise out of a tort.

*Per Cur.*—It was objected, that no such action was maintainable; that the foundation of it was in tort, the remedy for which died with the person; and that the doctrine of waiving the tort, and suing upon a contract implied by law, could not be extended to a case in which no remedy by action in tort existed to be waived. In the present case, the money which had been produced by the sale of that which had been wrongfully severed from the plaintiff's estate, and converted into chattels, is traced into the pocket of the intestate, it cannot be doubted, that an action for money had and received would have been maintainable against him for that money.

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OUGHTON *v.* SEPPINGS, T. T. 1830. K. B. 1 *B. & Ad.* 241.

THE defendant, who was a sheriff's officer, received a warrant against one W. He took a pony cart and harness, which W. was using at the time of the seizure; the cart had his name painted upon it. W. lived as lodger with the plaintiff, who claimed the pony as hers. She gave notice to the sheriff and the defendant, that she would bring an action, but the pony was sold by the sheriff under the execution; and the defendant admitted that he had received 8*l.* 10*s.*, the sum which it had produced at the sale.

Assumpsit or trover lies against a sheriff who seizes the property of a third person.

In an action for money had and received—

*Per Cur.*—If the plaintiff was in possession at the time when it was seized, she might clearly have maintained trespass against a wrong doer; and if she might maintain trespass, she may waive the tort, and maintain this action to recover the money which was produced by the sale of the horse, and which the defendant has admitted he received.

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BURNETT *v.* LYNCH, T. T. 1826. K. B. 5 *B. & C.* 589.

THE plaintiff having been sued for breach of covenant during the time his assignee continued in possession, under an assignment

Case or assumpsit lies

wrongful taking of a chattel, the tort may be abandoned, and the party sued for the value, (*Brown* v. *Hodgson*, 4 Taunt. 189), or for the price of goods when obtained by fraud. (*Hill* v. *Perrott*, 3 Taunt. 274).

against the assignee of a lease by the assignor, on the implied obligation to indemnify him from non performance of the covenants.

by deed poll, under and subject to the payment of rent and performance of covenants, &c., in the lease, and damages having been recovered, the plaintiff brought an action on the case, founded on breach of duty. Upon motion in arrest of judgment, on the ground that, having entered into no express covenant or contract, the action was not maintainable, the Court held, that the action of covenant could not have been supported, as being of a technical nature, and only maintainable against a party who has executed a deed under seal, or who by deed has agreed to do a certain thing; but that either assumpsit or case might besupported: the former arising upon an implied promise to perform the duties cast upon the person from whom he took the estate subject thereto; and the latter as founded upon the duty arising by his accepting the assignment, and for the breach of which a special action would lie.

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FAIRMAN *v.* GRIMBLE, E. T. 1826. N. P. 2 *C. & P.* 266.

When an article is delivered to an artificer for a particular purpose, to be completed within a given time, the latter stipulation not being performed, the owner cannot sue in trover;

THE servant of the defendant, a coach-spring maker, received a spring of the plaintiff's to repair, and promised to bring it back by a certain hour. The defendant after that refused to return it without being first paid for the repair.

Lord *Tenterden* held there was no conversion to the defendant's use; and if any action would lie, it must be on the special contract.

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SMITH *v.* COOK, E. T. 1826. N. P. 2 *C. & P.* 277.

but if there be in the hands of the defendant a quantity of goods, which he has undertaken to deliver, the plaintiff may bring trover, and need not resort to the contract.

THE plaintiff bought 200 sacks of flour of Messrs. H. & H., who gave a delivery order, addressed to the defendants, who were millers, and had large premises attached to their mill, in which flour was deposited, requiring them to deliver 200 sacks to the plaintiff. This order was served upon the defendants' foreman, who, when he received it, said "Very well." It appeared that 161 sacks had been delivered on orders signed by one B., who was the agent of the plaintiff; but when the order for the delivery of the remainder was presented, it was not attended to, in consequence, as was said by the defendants, of their not having any more flour of H. & H. in their possession.

*Best*, C. J.—I think there is evidence to go to the jury for them to say, whether there were not at one time 200 sacks of flour belonging to the plaintiff in the hands of the defendants, which they thought proper to undertake to deliver; and I am of opinion, that the plaintiff, under these circumstances, is not obliged to bring a special action of assumpsit.

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CANE *v.* CHAPMAN, M. T. 1836. K. B. 1 *N. & P.* 104.

Case lies against trustees under a public statute for the non payment of an annuity charged upon rates receivable by them.

CASE against the defendant, clerk to the commissioners for paving and lighting the town of Harwich. The declaration stated, that, after the passing of the local act, the plaintiff advanced to the commissioners, on mortgage, the sum of 1350*l.* for the purchase of an annuity on his own life; and thereupon, by a grant then made, according to the form of the statute, five of the commissioners, appointed in pursuance of the said act, did, by virtue of the said act, at a meeting held pursuant thereto, grant to the plaintiff an annuity of 140*l.* out of the rates granted, and to arise by virtue of the said

act, payable quarterly, the first payment to be made on the first of March then next ensuing; that a quarterly payment afterwards became due, and, before it became due, the commissioners had received, and then retained in their hands, out of the rates, sufficient funds to satisfy the said quarterly payment. Averment of request to pay, and that thereupon it became the duty of the commissioners to pay the said quarterly payment, or cause the same to be paid to plaintiff. Breach, non-payment thereof.

Plea, that it was not the duty of the commissioners to pay, or cause to be paid, the said quarterly payment modo et formâ.

Special demurrer to that plea.

The Court held, that, as the commissioners were not personally nor individually liable on this grant, they were responsible for a breach of public duty, in not paying the annuity out of the rates; and, therefore, were rightly sued in the name of their clerk.

*See Wormwell* v. *Hailstone*, 6 *Bing.* 668.

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### (*f*) Whether trespass or case*.

Barber *v.* Rollinson, H. T. 1833. Ex. 1 *C. & M.* 330.

A party who merely puts the law improperly in motion can-

The defendant gave information before a magistrate, upon which the plaintiff was taken up on a warrant, and brought before the magistrate. After the charge was dismissed for the time, and the

* The distinction between trespass and case is this: immediate damage to the plaintiff's property is a ground for trespass; consequential damage to it is a ground for case. (*Howard* v. *Blake*, 4 Burr. Rep. 1113; *Harker* v. *Birbeck*, 3 Id. 1556; *S. C.* 1 Blac. 482; *Wilson* v. *Mackreth*, 3 Burr. Rep. 1824).

The defendant threw a lighted squib, at adventures; it fell upon the stall of A.; one B., in order to prevent an injury to himself, and to preserve A.'s goods, took up the squib and threw it away; it lit upon the stall of C. C., to preserve himself and goods, seized the squib and threw it from him; in doing this it struck the plaintiff, and burnt and put out his eye:—Held, by three judges against Blackstone, that trespass was the proper remedy. (*Scott* v. *Shepherd*, 2 W. Black. 892; 3 Wils. 403).

If a forcible injury is the immediate consequence of an act, the remedy is trespass; if a remote consequence, case; therefore, trespass, not case, lies against A. for so carelessly driving his cart that it was driven against the carriage of B. (*Day* v. *Edwards*, 5 T. R. 648).

An injury, occasioned by one ship running foul of another through negligent management, is remediable by case; if through design, by trespass. (*Ogle* v. *Barnes*, 8 T. R. 188).

Trespass.—The declaration stated, that the defendant drove and struck a single horse chaise, which he was then driving along the highway, with such great force and violence, upon and against the plaintiff's curricle and the horses drawing it, and in which the plaintiff was then driving, that, by means thereof, the horses took fright and ran away, upon which the plaintiff, to preserve his life, jumped out, and fell upon the ground, and broke his collar bone. Plea, not guilty. At the trial, it appeared that the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, without any design, on his part, to injure the plaintiff. The objection, that the injury having resulted from negligence, and not from design, the form of action should have been case, and not trespass, was taken and allowed; and the plaintiff, thereupon, was nonsuited; which nonsuit the Court of King's Bench set aside, and granted a new trial on the following grounds:—1. That it was immaterial, in order to decide as to the form of action, to consider whether or not the defendant intended to injure the plaintiff;—2. That the defendant had impelled the horse forward, and from that the injury happened; and so, there being an immediate injury from an immediate act of force by the defendant, the proper remedy was trespass. (*Leame* v. *Bray*, 3 East, 593).

not be sued in *trespass*, but is only liable in case.

plaintiff liberated on his promise to appear at a future day, the defendant stated, that he had another charge of forgery against the plaintiff; upon which the plaintiff, who was retiring, was again put to the bar. In an action of trespass,

*Per Cur.*—Whilst the party is before the magistrate, under the warrant, the defendant says, that he had another charge against him. That was a part of the proceedings before the magistrate, and was no trespass in the defendant.

*See* 5 *C. & P.* 206; 1 *M. & R.* 160.

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WILLIAMS *v.* HOLLAND, T. T. 1833. C. P. 3 *M. & Scott*, 540; S. C. 6 *C. & P.* 23; 10 *Bing.* 112.

If the proximate cause of an injury be negligence and want of skill, though the injury itself be immediate, case may be sustained.

THIS was an action on the case, in which the declaration stated that the plaintiff was possessed of a cart, and horse drawing the same, in which cart were the plaintiff's son and daughter; and that defendant was possessed of a gig, and horse drawing the same, which gig and horse were then under the care &c. of the defendant, who was driving the same in and along the highway; nevertheless, defendant so carelessly, unskilfully, and improperly drove &c. his said gig and horse, that, through the carelessness of the defendant, the said gig and horse of the defendant run and struck with great violence upon and against the horse and cart of the plaintiff, and thereby broke to pieces the same, and the son and daughter of the plaintiff were greatly hurt. The defendant pleaded the general issue; and, on the trial, the question left to the jury was, whether the injury was occasioned by the negligence and carelessness of the defendant; which question the jury found in the affirmative.

A rule was granted for setting aside the verdict, and entering a nonsuit, which was afterwards discharged, the Court being of opinion, that, as the declaration stated the ground of action to be an injury occasioned by the carelessness and negligence of the defendant in driving his own gig, and that such carelessness and negligence is strictly and properly in itself the subject of an action on the case.

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HENSWORTH *v.* FOWKES, H. T. 1839. K. B. 4 *B. & Ad.* 449.

When it appears from the whole declaration, that the substance of complaint is the abuse of legal authority, although stated informally, as a direct entering of a house, and imprisoning the plaintiff, case will lie;

THE plaintiff declared in case, stating, that the defendant, intending to injure the plaintiff in his good name, and to cause his dwelling house to be searched for stolen goods, and to procure him to be imprisoned, went before a magistrate, and falsely, maliciously, and without probable cause, charged, that certain specified goods of the defendant had been feloniously stolen, and that he suspected that the said goods were concealed in the plaintiff's dwelling-house; and, upon such charge, the defendant procured the magistrate to grant a warrant, authorizing a constable, with necessary assistance, to enter the plaintiff's house to search for the said goods; and the defendant, with other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the said goods by such persons, and the door of such house, and a pantry there, to be broken to pieces, and the plaintiff and his family to be disturbed in the possession, and his goods to be carried away. The general conclusion was, that, by means of the premises, the plaintiff was injured in his good name and trade, put to expense, and hindered in

his business. A count in trover was added. Upon general demurrer,

The Court held, that, looking at the whole declaration, what followed the making of the charge and obtaining the warrant, was attributable to the charge, and done under the warrant, and was therefore the subject-matter of an action upon the case; and although it might be bad, on special demurrer, for informality, in not alleging more particularly that it was done under the warrant, it was not misjoinder of case and trespass. *Littledale*, J., dubitante.

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STURCH *v.* CLARKE, E. T. 1832. K. B. 1 *N. & M.* 671.

so, it lies for an excessive levy for poor rates;

IN an action on the case for an unreasonable and excessive distress for poor rates alleged and pretended to be due.

After verdict, on motion in arrest of judgment, the Court held, that the plaintiff might waive the trespass, and declare in case.

*See Branscomb* v. *Bridges*, 1 *B. & C.* 145.

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BRYAN *v.* WHISTLER, E. T. 1828 K. B. 2 *M. & R.* 318.

so, if an action lies at all for disturbing a party in his right to burial in a vault, case, and not trespass, is the remedy*.

THE declaration, in an action on the case, stated, that plaintiff, by the consent and agreement of defendant, by him as rector, given and made to plaintiff, in consideration of the sum of 20*l.* paid by plaintiff to defendant in that behalf, had become and was entitled to the exclusive use and benefit of a certain vault, situate and being in the said church; yet defendant, well-knowing &c., but contriving &c. to deprive plaintiff of the exclusive use and benefit of the said vault, wrongfully and injuriously, without the leave or license, and against the will of plaintiff, defaced, injured, broke into, dug into, and opened, and caused and procured &c. the said vault &c., by means whereof plaintiff hath lost and been deprived of the benefit and advantage of the said vault. It was contended, that this action was not maintainble; it was obvious, that the gist of the grievance complained of is the infringement of the plaintiff's right to the exclusive possession and use of the vault; that, if the action were maintainable at all, at least it was not in its present form; the remedy for such a grievance as the plaintiff complains of being an action of trespass, and not an action on the case.

*Sed per Cur.*—This action was properly brought as an action on the case, supposing it to have been maintainable at all; but the right claimed by the plaintiff is an interest in land, not, properly speaking, an estate, but rather an easement, and therefore requiring a grant in writing for its creation; and, consequently, that the plaintiff, who claims only by a parol grant, has no right of action at all.

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### (*f*) WHETHER DEBT OR AN ACTION ON THE REALTY†.

* Where light is obstructed by a defendant building on a party wall between her house and the plaintiff's, the latter may support either trespass or case. (*Wells* v. *Ady*, 7 C. & P. 19).

† At common law debt does not lie for the arrears of a freehold rent as for life, whilst the freehold continues. The statute, 8 Anne c. 14. s. 4. only applies to rent on leases for life or lives; therefore, debt does not lie for the arrears of a rent-charge granted for life during the lifetime of the grantee, unless he has the option to consider it as personal. (*Webb v. Jiggs*, 4 M. & S. 113).

## VI. OF CIRCUITY OF ACTION*.

CARR *v.* STEPHENS, T. T. 1829. K. B. 9 *B. & C.* 758.

A plaintiff, who, though he may have a *primâ facie* case against a defendant in one form of action, would be liable over to him in another, in respect of the same subject matter, he cannot sue.

IN this case the defendant was the receiver of the plaintiff's wife's estate, who, by the directions of the husband, but without the wife's authority, accepted a bill for the husband's debt to the drawer, and was afterwards called upon by the husband and wife to pay over to them the rent received; and when the bill became due, he refused to pay it unless the plaintiff would give him an indemnity for being reimbursed by the husband and wife; which was accordingly given. The bill, however, not being ultimately paid, the Court held, that, to avoid circuity of actions, the drawer could not maintain the action.

## VII. OF SPLITTING ACTIONS.

HEMING *v.* WILTON, H. T. 1839. N. P. 5 *C. & P.* 54.

A second action may be brought for a part of a demand, where a plaintiff is incapable, for want of evidence, of sustaining his suit for it in the first†.

THE plaintiff was an attorney, and had brought an action against the defendant for his bill for business done, but only recovered a small sum for money lent, as there had been no bill delivered. *Parke*, J., held that the plaintiff might recover for the business done in another action, after the bill was delivered, although this was part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second.

HODLEY *v.* GREEN, E. T. 1832. Ex. 2 *Tyrw.* 390.

As where the first action could not legally comprise all that is recoverable in the second.

THE plaintiff declared in debt for double rent for use and occupation, with a count for money had and received, and obtained a general verdict for the amount of rent only. Two days before the trial of the action he delivered a declaration in case, with a count for digging quarries and carrying away stone, and in trover for stone, with a bill of particulars for stone converted, corresponding precisely with the bill of particulars in the count for money had and received in the former action.

The Court held, that the second action was maintainable, Lord *Lyndhurst* observing, that judgment in the first action would be no bar to a recovery on the count in trover in the second action.

*See* 6 *T. R.* 607; 3 *B. & C.* 239; *S. C.* 5 *D. & R.* 87; 9 *B. & C.* 780; 7 *Bing.* 716.

* To avoid circuity of action, a covenant in the same deed may be pleaded in bar to an action on the deed. (*Johnson* v. *Carre*, 1 Lev. Rep. 152). But it is otherwise where the covenant is in another instrument; for the last deed does not take away the effect of the former; and a subsequent covenant cannot be pleaded in bar of a former, but the defendant must bring his action on the last indenture. (*Gauden* v. *Draper*, 2 Vent. 217).

† A party cannot separate one entire cause of action into parts, and sue for one part on one occasion and the other part on another; (1 Vent. 73; S. C. 1 Lev. 464; 3 Id. 248); but if a plaintiff omits to give any evidence of a part of his demand in a prior action, though he had an opportunity of doing so, he is not precluded from bringing another suit. (6 T. R. 607; 4 M. & S. 153.)

## IX. OF BRINGING SECOND ACTION FOR THE SAME CAUSE*.—See tit. *Consolidating Action.*

EVERETT *v.* YOUELLS, H. T. 1832. K. B. 3 *B. & Ad.* 349.

Where a jury is discharged by consent, the plaintiff cannot sustain a second action for the same cause;

THE jury by consent in this case were discharged; a subsequent action was brought for the same cause. On motion to stay proceedings,

*Per Cur.*—The present action must be stayed: the plaintiff ought to proceed with the former action, not with the present; but there is no ground for demanding the costs of the former suit.

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LORD BAGOT *v.* WILLIAMS, T. T. 1824. K. B. 3 *B. & C.* 235; S. C. 5 *D. & R.* 87.

nor after compromise of first; and where declaration is framed in same manner in first as second suit, it is for plaintiff to shew that they are not for the same cause of action;

ACTION for money had and received. The defendant pleaded a recovery in an inferior Court, and plaintiff replied that the causes of action were not the same, and issue thereon, the defendant having suffered judgment on such count by default, the plaintiff, after an investigation of the accounts by his agents, verified for a smaller sum without going before a jury; and it appearing that such agent was at the time aware of the sums claimed in the second action being due to the plaintiff, the Court held, that he was as much bound as he would have been by the verdict of a jury; and that having once abandoned his claim he had done it for ever. And the Court said, that when the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the plaintiff to shew that they are not the same.

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MOSCARTI *v.* LAWSON, H. T. 1836. 1 *Har. & Woll.* 1770.

and when a juror is withdrawn the Court will stay all proceedings;

IN an action for a libel the judge suggested the withdrawal of a juror, and the plaintiff acted upon the suggestion. On motion to stay the proceedings in the second action, commenced by the same plaintiff for the same cause, the Court ordered the proceedings to be stayed, even though it appeared that the plaintiff in the first action had conducted his case in person.

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LIVERSEDGE *v.* GOODE, E. T. 1833. K. B. 2 *D. P. C.* 141—S. P. PEPPER *v.* WHALLEY, E. T. 1835. K. B. 3 *D. P. C.* 579.

but Court will not do so unless it clearly appears that the second action is for the same cause. Hence, after non pros in replevin it will not stay proceedings in trespass for the same cause.

MOTION to stay proceedings in an action of trespass, on ground that an action of replevin had been previously brought for the same seizure, and the plaintiff in that suit non prossed for not declaring. *Patteson*, J., refused to interfere on motion, and said that the party might plead the judgment, if he thought such a judgment available.

* See 2 Wils. 87; 3 Id. 304; 6 T. R. 607; 2 Bing. 377; 5 C. & P. 54; 3 B. & Ad. 349; 2 C. & J. 374; 1 C. & M. 487; 5 M. & P. 756.

## XI. OF BRINGING ACTION BEFORE THE RIGHT LEGALLY ACCRUED*.

STRUTT *v.* SMITH, T. T. 1834. Ex. 1 *C., M., & R.* 312; S. C. 4 *Tyrw.* 1019.

Where defendant is entitled to elect as to the period of credit, the plaintiff cannot sue till the expiration of time allowed for making the election.

IN an action for goods, sold it appeared that the goods in question were sold on the terms of credit as follows: Prices of cotton yarns, &c., sold, &c., $7\frac{1}{2}$ per cent. discount, bill at three months; 10 per cent. discount, cash in fourteen days. The jury found a verdict for the plaintiffs for the whole price of the goods, with liberty to the defendant to move to enter a nonsuit if the Court thought the action was brought prematurely. On motion for that purpose,

*Per Cur.*—The plaintiffs and defendant defined their mode of dealing. The plaintiffs say we will deal with you either on the terms of your paying in cash at the end of fourteen days, or on the terms of your giving a bill at three months. The difficulty in the terms was as to what would be the credit if the cash were not paid and the bill were not given; but we need not determine that, as the plaintiffs have sued within the fourteen days, during which the defendant had a right to consider whether he would pay in cash or take the credit.

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BULL *v.* PRICE, H. T. 1831. C. P. 7 *Bing.* 237. S. C. 5 *M. & P.* 2.

Commission to be paid on price obtained cannot be sued for, when the getting of the money is not delayed by act of defendant, until purchase money actually paid.

THE defendant empowered the plaintiff, a surveyor, to negotiate with commissioners for the sale of her reversionary interest in freehold premises, and undertook to pay him 2 per cent. on the sum obtained, either by treaty, arbitration, or verdict of a jury, for his trouble and exertions; the plaintiff not agreeing with the commissioners, a sum was afterwards awarded by a jury, and the plaintiff, being called on to execute the conveyance, the execution by an incumbrancer was also required, which the defendant declining to obtain, the money was paid into the Bank, and remained there at the time of the action being brought. The Court held, that the receipt of the money not being delayed by any wilful act of the defendant the action was commenced too soon; until the incumbrancer had been paid, the sum to be received by the defendant could not be ascertained.

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ANDREWS *v.* DALLY, E. T. 1828. C. P. 4 *Bing.* 566.

Where a stat. directs that a demand shall be paid out of first monies

THIS was an action by an attorney against the clerk to the commissioners named in an act of parliament, by which it is provided, "that the expenses of passing that act shall be paid by the commissioners out of the monies or funds that shall be raised or levied

* An action does not lie before the cause of it technically accrues; and if it be prematurely brought it may be pleaded in abatement, or the Court, if it appears on the record, will arrest the judgment. (*Harker* v. *Morland*, 2 Lev. Rep. 196; *Venables* v. *Daffe*, Carth. Rep. 114). As in debt upon bond for performance of covenants, if a breach be assigned as committed after the commencement of the suit, it will be bad. (*Champian* v. *Skipworth*, 1 Sid. Rep. 307). The Court, in one case, on a summary application, set aside proceedings where the action was commenced before the cause of action accrued. (*Kerr* v. *Dick*, 2 Chit. Rep. 11). See post, tit. "Declaration."—That the credit has not expired, need not be pleaded specially. See 1 C., M., & R., 741; 1 M. & W. 336; Id. 542; 5 A. & E. 159; 1 N. & P. 18.

under the first act, or out of the monies or funds that shall be raised or levied under the second."

raised under it, plaintiffs cannot sue till sufficient money has been obtained.

*Per Cur.*—The commissioners cannot be called on to pay until those funds are raised. The plaintiff ought therefore to have shewn that there had been a sufficient sum levied by tolls, or otherwise, to satisfy his demand before he could be entitled to recover.

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WEBB *v.* FAIRMANER, E. T. 1838. Ex. 3 *M. & W.* 473.

The time of credit given upon a contract of sale is computed exclusively of the day on which the agreement is made.

GOODS were sold on 5th October to be paid for in two months. The action was brought on 5th December. The plaintiff having obtained a verdict, the Court made a rule absolute for a new trial, observing that the test suggested by Lord *Tenterden* in *Pellew* v. *The Inhabitants of Wexford*, 9 B. & C. 134, was applicable to the present case; that is, to reduce the whole period to one day, and try when it would necessarily end if so reduced. In this way, if the time of credit here given were one day only it would be impossible to say that the other party had not the whole of the following day on which to pay; and if this is true of one day it is equally true of any number of days; and therefore the credit did not expire so as to enable the seller to sue till after the 5th of December.

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XI. ESTABLISHED FORMS MUST BE OBSERVED*.

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## Action, Notice of.

See also tits. *Justices—Nuisances—Time, Computation of.*

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I. WHEN AND TO WHOM NECESSARY TO BE GIVEN, p. 80.
- (*a*) IN GENERAL, p. 80.
- (*b*) TO JUSTICES OF PEACE, p. 83.
- (*c*) TO OTHER PERSONS, p. 85.

II. FORM AND REQUISITES OF, p. 87.
III. BY WHOM TO BE GIVEN, AND DESCRIPTION OF THE PARTY GIVING IT, p. 89.
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VI. EVIDENCE CONNECTED WITH, p. 91.
VII. EFFECT OF WANT OF, p. 92.

* The particular remedies appropriated by law must invariably be pursued, and the parties cannot depart from them even by a special agreement. (*Ker* v. *Osborne*, 9 East, 377; 15 Id. 309; 1 Peters. Abr. 198; and cases there collected).

## I. WHEN AND TO WHOM NECESSARY TO BE GIVEN.

### (*a*) In general *.

Cook *v.* Leonard, H. T. 1827. 6 *B. & C.* 351.—S. P. Norris *v.* Smith, Q. B. 2 *P. & D.* 353—S. P. Wright *v.* Wales, 5 *Bing.* 336—S. P. Butler *v.* Ford, T. T. 1833. Ex. 1 *C & M.* 662.

Notice of action is only required where the party sued had reasonable ground for supposing that he was acting legally, not where wrong done wholly without authority.

At the trial it appeared, that the plaintiff had been exhibiting a dromedary in the streets of Stroud: the defendants, one of whom was a police officer, appointed under the provisions of the act, 6 Geo. 4, c. 6, and who, it was alleged, acted by the order of certain commissioners also appointed in pursuance of the same act, went to a stable where the animal then was, and led it away. The plaintiff interfered; and the defendants thereupon committed the assault and imprisoned the plaintiff as averred in the declaration. Upon these facts an objection was taken that there ought to have been a notice of action.

Mr. Justice *Bayley*.—The general rule, as I understand it, that always prevails in these cases is this, that where the constable or magistrate has authority to do a part of that which he does, and

* A formal notice of action, prior to its actual commencement, is only essential in the particular instances in which the legislature has, by express enactment, directed such a preliminary to be observed. The following alphabetical table will be found useful:—

| *Parties.* | *Time.* | *Statutes.* |
|---|---|---|
| Army, Officers in . . . | One Calendar Month | 6 G. 4, c. 108, s. 93. |
| Bankrupt, Commissioners of | One Calendar Month | 6 G. 4, c. 16, s. 41. |
| Bread Act . . . . | Seven Days . . . | 3 G. 4, c. 106, s. 29. |
| Building Act . . . . | Twenty-one Days . | 14 G. 3, c. 78, s. 100. |
| Clergymen, for Non-Residence . . . | One Calendar Month | 57 G. 3, ss. 99, 141. |
| Customs, Officers of . . | One Calendar Month | 28 G. 3, c. 37, s. 25. |
| Cruelty to Animals' Act . | Fourteen Days . . | 5 & 6 W. 4, c. 59, s. 19. |
| Dock Companies, West-India and London . | Fourteen Days . . | 39 G. 3, c. 69. |
| Excise, Officers of . . . | One Calendar Month | 7 & 8 G. 4, c. 53, s. 114. |
| Highway Act . . . | Twenty-one Days . | 5 & 6 W. 4, c. 50, s. 109. |
| Justices of the Peace . . | One Calendar Month | 24 G. 1, c. 44, s. 1. |
| Larceny Act . . . . . | One Calendar Month | 7 & 8 G. 4, c. 19, s. 75. |
| Malicious Trespass Act . . | One Calendar Month | 7 & 8 G. 4, c. 30, s. 41. |
| New Street Act . . . | Twentyo-ne Days . | 57 G. 3, c. 29. s. 136. |
| Newspaper Duties Act . . | One Calendar Month | 6 & 7 W. 4, c.76. s. 26. |
| Parliament, Act for Building New Houses of . | Twenty-eight Days . | 1 & 2 Vict. c. 7, s. 36. |
| Police Act, (Metropolitan) . | One Calendar Month | 10 G. 4, c. 44, s. 41. |
| Poor Law Act . . . | One Calendar Month | 4 & 5 W. 4, c. 76, s. 104. |
| Requests, Court of, Act . . (London) | Forty-two Days . . | 5 & 6 W. 4, c. 9, s. 163. |
| Ditto, Westminster . . . | Ten Days . . . , | 6 & 7 W. 4, c. 137, s. 85. |
| Ditto, Southwark . . . . | Fourteen Days . . | 46 Geo. 3, c. 87, s. 21. |
| Tax Act . . . . . | One Calendar Month | 43 G. 3, c. 99, s. 70. |
| Turnpike Act . . . . | Twenty-one Days . | 3 G. 4, c. 126, s. 143. |
| Watermen's Act . . . | Fourteen Days . . | 7 & 8 G. 4, c. 75, s. 93. |

In addition to this alphabetical list, most of the public companies and acts for the creation of public trusts, have provisions prohibiting the commencement of actions without some prescribed form.

acts bonâ fide under the persuasion that he is in the discharge of his duty, then he is protected. If, however, there be no authority whatever the case will be materially different; and that is the distinction which has always been taken. If a magistrate, for instance, do an act which is wholly out of the limits of his jurisdiction, he would have no right by colour of his office to claim this privilege. But there is a difference between exceeding his authority and acting without any, and therefore, in *Weller* v. *Toke*, 9 East, 364, where one magistrate did that which two only had authority to do, it was held, that he was entitled to notice, because he acted colore officii. This doctrine, indeed, may safely be laid down, that where there is some power, though that has been exceeded, notice is necessary, but that it is not where there is no authority. The defendants had no colour of authority for what they did, and are altogether out of the protection of the act.

*See* 3 *B. & C.* 729; 4 *T. Rep.* 485.

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LIDSTER *v.* BORROW, H. T. 1839. Q. B. 9 *A. & E.* 654.

As where he held a particular office, but such appointment, in fact was not renewed.

A PLAINTIFF had been nonsuited for want of giving notice of action. The defendant had had a deputation as gamekeeper of a manor, authorizing the seizure of dogs and of uncertificated persons: the deputation had been granted in 1814, but not renewed. The defendant had seized two greyhounds of the plaintiff's. On motion for setting aside the nonsuit, the Court held, that a party fancying that he fills a character which he does not fill, cannot claim to be protected.

*See Bush* v. *Green*, 4 *Bing. N. C.* 41; *and post, tit.* "*Game.*"

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BUTLER *v.* FORD, T. T. 1833. Ex. 3 *Tyrw.* 677; S. C. 1 *C. & M.* 662.

Notice must be given where act done by subordinate officers, and evidence of their acting officially is sufficient, without strict proof of appointment.

BY a local act for paving, lighting, watching, and improving the town of Leamington, certain commissioners were appointed; and, by sect. 11, were authorized to appoint by writing a treasurer and clerk, and also all such surveyors, scavengers, rakers, &c. &c., beadles, constables, watchmen, and other officers, deputies, or assistants, for the execution of the purposes of the act, as they should from time to time think proper. By sect. 77, the commissioners were also empowered to appoint such number of able-bodied men as they should think proper, to be employed as watchmen during the night time; and it was enacted, that it should be lawful for such watchmen, and they were thereby required in their respective stations to apprehend and secure all malefactors, &c. &c., and all suspected persons, who should be found wandering or misbehaving themselves during the hours of keeping watch. By sect. 78, the watchmen were to be sworn in as constables, and even to be invested with the like powers and authorities, &c. &c., as any constable was invested with or enjoyed by law. By sect. 163, it was enacted, that no action, suit, or information, should be commenced against any person or persons, for anything done or to be done, under or by virtue of that act, until one calendar month's notice thereof should have been first given in writing to the clerk of the commissioners of the cause of action, nor at any time whatsoever after sufficient satisfaction or tender should have been made to the party aggrieved. The act contained the usual power of pleading

the general issue and giving the special matter in evidence, and the act was to be deemed a public act. In an action of trespass, the Court held, 1st, That the section requiring notice to be given was not confined to acts done or directed to be done by the commissioners, but applies to acts done by constables and watchmen; 2ndly, That evidence of the defendants acting as constables and watchmen under the commissioners in the town was primâ facie sufficient to entitle them to the protection of the above section without proof of their appointment; and 3rdly, That where the watchmen had reasonable ground of suspicion that felony had been committed by the plaintiff, and went to the plaintiff's house to apprehend him for such felony, but beat him, and used much more violence than was necessary for effecting his apprehension, they were protected by the section requiring notice.

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FLETCHER *v.* GREENWELL, T. T. 1835. Ex. 4 *D. P. C.* 166.

Under a statute that notice should be given to parochial officers for anything done in pursuance of the act, applies only to torts, not to actions on contracts.

ASSUMPSIT for work and labour. The defendant was sued as vestry-clerk of the parish of St. Mary-le-bone, in pursuance of the provisions of a local act of parliament: the plaintiff obtained a verdict.

On motion for a nonsuit, on the ground that no notice of action had been given, according to the direction contained in the local act of 35 Geo. 3, c. 73, which enacted that no action or suit should be commenced against any person or persons, for anything done in pursuance of that act, until twenty-one days' notice thereof should be given in writing to the clerk of the said vestrymen, the case of *Waterhouse* v. *Keen*, 4 B. & C. 200, was relied on: it was assumpsit against a toll-collector, to recover back tolls which had been improperly taken by the defendant; there was a clause in the act similar to that in the present case, and it was held, that the defendant was entitled to notice of action. Mr. Justice *Bayley*, in his judgment, says, "The question is, whether the provision is confined to actions of tort, or extends to actions of assumpsit. The substantial part of the enactment is, that notice should be given to the trustees, in order that they may tender satisfaction.

*Sed per Park*, B.—The case cited was, in substance, an action for extorting money by duress, though the plaintiff was entitled to recover it back by an action of assumpsit for money had and received. The case is plainly distinguishable from the present. There is no case in which it has been held that a contract of this kind is within a statute containing such clauses as to notice of action.

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PALMER *v.* GRAND JUNCTION RAILWAY COMPANY, H. T. 1839. Ex. 4 *M. & W.* 749; S. C. 7 *D. P. C.* 232.

Hence, a railway company is not entitled to notice of action for negligence in carrying goods.

IN an action against the Grand Junction Railway Company, for not safely carrying and conveying some horses in their carriages on the railway, whereby one was killed and others were injured; it appeared that, by the stat. 3 Will. 4, c. 34 (local and personal, public), the Grand Junction Railway Company are empowered to make a railway from Warrington to Birmingham; by sect. 154, they are empowered to receive certain tonnage-rates for all articles, matters, or things carried on the railway; by sect. 156, the company are empowered to become carriers themselves, and are authorized, if they

shall think proper, to use engines, &c. to carry and convey upon the railway all such passengers, cattle, goods, wares and merchandize, articles, matters, and things as shall be offered to them for that purpose, upon certain reasonable charges; by the 214th sect. no action, suit, or information, nor any other proceeding, of what nature soever, shall be brought, commenced, or prosecuted against any person for anything done, or omitted to be done, in pursuance of the act, or in the execution of the powers, or authorities, or any of the orders made, given, or directed in, by, or under the act, unless fourteen days' previous notice, in writing, shall be given by the parties intending to commence or prosecute such action.

*Per Cur.*—No notice of action was requisite. Defendants are sued as common carriers, who have received some horses for the purpose of being taken to their journey's end, which they have not so delivered; but that, on the contrary, one has been killed and three severely injured, in consequence of an accident on the railroad: the action is brought against them, therefore, in their character of common carriers; and it appears to us, that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it. The act does not compel them to be common carriers, it only enables them to be, so far as they shall think fit; and when they have elected to become so, they are liable, in that character, in the same way that other common carriers are. On that ground, we think the 214th section does not apply to this case.

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CHARLESWORTH *v.* RUDGARD, M. T. 1834. Ex. 1 *C. M. & R.* 498; S. C. 4 *Tyrw.* 124.

So, notice need only be given where a thing is done by virtue of a statute, and not where done in contravention of it.

UNDER a local act of parliament, 9 Geo. 4, c. 27, for paving, watching, lighting, and improving a town, it was urged that the defendant, a commissioner under the statute, who had become liable to a penalty, was entitled to notice of action. But the Court were of opinion, that a clause requiring notice of action only applied to what was done by virtue of the act, and not to penalties for acting in direct contravention of it.

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### (*b*) TO JUSTICES OF THE PEACE*.

JAMES *v.* SAUNDERS, H. T. 1834. C. P. 10 *Bing.* 429; S. C. 4 *M. & Scott*, 316.

Justice not entitled to notice

IN an action against a magistrate for imprisonment, it appeared that a riot had taken place at an election, and the defendant, seeing

* Stat. 24 Geo. 2, c. 44, enacts, "That no writ shall be sued out against, nor any copy of any process at the suit of a subject, shall be served on any justice of the peace for anything by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath, or claimeth to have, against such justice of the peace; on the back of which notice shall be indorsed the name of such attorney or agent, together with the place of his abode, who shall be entitled to have the fee of twenty shillings for the preparing and serving such notice, and no more."

where jury think he is not acting under a bonâ fide impression that what he did was within the scope of his duty.

several persons passing towards the spot, rushed out; and, seizing the plaintiff by the collar, exclaimed, "You are one of the rascals;" and detained him for a few minutes till a constable, who came up, informed the defendant that the plaintiff was not one of the rioters. It further appeared, that there was no disturbance near the spot where the plaintiff was, and that he was passing quietly along to his work. On the question, whether notice of action ought to have been given,

*Per Cur.*—The protection afforded by the statute can only be of use where the party has acted upon an erroneous supposition that the act he does is within the scope of his duty as a magistrate. The defendant, in this case, would clearly have been entitled to the notice of action required by the statute, had he been acting bonâ fide under an impression, though erroneous, that what he did was in the performance of his duty.

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WEDGE *v.* BERKLEY, E. T. 1837. K. B. 1 *N. & P.* 665.

Notice must be given, though the act be wrongful.

ON the trial it appeared, that the plaintiff's son was wheeling some newly-cut grass in his father's wheelbarrow, when the defendant, who was a justice of the peace, came up to him and inquired what he had got in the barrow; and, on being told it was grass, said it was stolen property, and that, as he was a magistrate, he should seize it; which he did, and directed his coachman to wheel it to his house. The plaintiff came and stated that it was not stolen; but the defendant persisted in his charge, and reiterated that he should detain it as stolen property. On the next day he restored it. This being the plaintiff's case, the defendant's counsel applied for a nonsuit, on the ground that there had been no notice of action delivered to the defendant, pursuant to the stat. 22 Geo. 2, c. 44. The Judge who tried the cause refused to nonsuit, but reserved the point. Evidence was then given for the defendant, which did not materially alter the case, and the Judge directed the jury to say whether the defendant had reasonable or probable grounds for suspecting that the grass had been stolen; for if he had, he was entitled to a verdict.—The jury found a verdict for the plaintiff.

On motion to enter a nonsuit,

*Per Cur.*—If the plaintiff intended to say that the defendant was not entitled to notice, because he was not bonâ fide acting as a justice, but collusively only, the question of bona fides ought to have been submitted to the jury; and if they had negatived it, the provisions of the statute would not have applied. But as that ques-

* As where one magistrate committed the mother of a bastard child, though two magistrates only have jurisdiction in such case:—Held, that he was entitled to notice; for he intended to act as a justice at the time, however mistakingly. (*Weller* v. *Toke*, 9 East, Rep. 364, cited *ante*, 81). So, where he has authority over the subject-matter of complaint, though the place where the offence is committed is not within his jurisdiction. (*Prestidge* v. *Woodman*, 1 B. & C. 12). So, where the capacity in which the party acted is general, as where a lord of a manor, being also a justice, seized a gun in the house of an unqualified person, it will be presumed he acted as a justice. (*Briggs* v. *Evelyn*, 2 H. Bl. 114). But where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, but is wholly diverso interito, notice is not required; thus, where a justice, who was also mayor of a borough, received a fee for granting a license to a publican, it was held, that such fee could not have been taken by him in his character of a magistrate, and that he was not entitled to notice. (*Morgan* v. *Palmer*, 2 B. & C. 729).

tion was not put, and it was assumed throughout the whole case that he was acting bonâ fide, the leave granted by the learned Judge must be followed up, and the plaintiff must be nonsuited for want of the notice.

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ROGERS *v.* BRODERIP, H. T. 1827. K. B. 9 *D. & R.* 194.

IN an action against a magistrate, under the 2 Geo. 3. c. 28, the plaintiff proved service of a notice not perfectly conformable with the requisites of the 24 Geo. 2. c. 44; the name and place of abode of the plaintiff's attorney were not indorsed upon the back of it. Lord *Tenterden*, C. J., was of opinion that the objection was fatal, and accordingly directed a nonsuit.

The 2 Geo. 3, c. 28, giving further protection to parties, does not deprive them of right to notice under 24 Geo. 2, c. 44.

And *Per Cur.*—The 2 Geo. 3. c. 28., by which additional protection is given to justices, in cases of actions brought against them for anything done in pursuance of that act, but which does not direct notice of action, does not deprive them of their right to the notice required by the 24 Geo. 2. c. 44.

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(*c*) TO OTHER PERSONS*.

SELLICK *v.* SMITH, T. T. 1826. C. P. 11 *Moore*, 459.

IN trover against the treasurer of the West India Dock Company for sugars deposited in the company's warehouses.

The clerk of the West India Dock Company is entitled to notice when sued as treasurer, though he may have delivered over the chattels upon an indemnity.

The fourteen days' notice required by the stat. 39 Geo. 3. c. 69., was given to the defendant as treasurer of the West India Dock Company, before the commencement of the action; but the suit was not commenced within three calendar months next ensuing the time of the refusal to deliver the goods. It appeared that the sugars had been delivered up under a bond of indemnity.

*Per Cur.*—If such notice of action were not to be given, it would be impossible for the company to ascertain the circumstances essential to their defence.

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BEECHEY *v.* SIDES, T. T. 1829. K. B. 9 *B. & C.* 806; S. C. 4 *M. & R.* 634—S. P. REED *v.* COWMEADOW, N. P. 7 C. *& P.* 821.

ACTION for false imprisonment. W. was tenant to the defendant of a farm and two meadows, in one of which there were some willow trees which Weller, in pursuance, as he alleged, of the custom of the country, claimed the right to lop. W. accordingly sold the loppings to H. who employed the plaintiff to lop the trees. The defendant gave him notice to desist; and upon his nevertheless persevering, the defendant, considering the plaintiff as a person committing an offence against the stat. 7 & 8 Geo. 4. c. 30, procured

So, the owner of property, acting under a bonâ fide supposition that he was acting in pursuance of 7& 8 Geo. 4, c. 30, s. 28, is entitled to notice under s. 41†.

* By 28 Geo. 3, c. 27, s. 25, (now in force, 3 & 4 Will. 4, c. 53, 7 & 8 Geo. 4, c. 53,) no writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order in his or their aid, for anything done in the execution, or by reason of that or any other act or acts of parliament then in force, or thereafter to be made, relating to the said revenues, or either of them, until one calendar month next after notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode, by the attorney or agent, for the person who intends to sue out such writ or process as aforesaid.

† Sec. 41 enacts, "That in all actions commenced against any person for any-

a constable, who, by the defendant's direction, took the plaintiff into custody. It was objected, on the part of the defendant, that the action could not be supported for want of the notice of action required by the 41st section of the statute; the action being brought against him for a thing done in pursuance of the act.

*Per Cur.*—The defendant, bonâ fide, though erroneously, supposed that he was acting in pursuance of the stat. 7 & 8 Geo. 4, c. 30, when he caused the plaintiff to be taken into custody. The protection is extended to private persons as well as peace officers if they have acted bonâ fide.

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COOK *v.* CLARK, T. T. 1833. C. P. 10 *Bing.* 19; S. C. 3 *M. & Scott*, 371; S. C. 2 *D. P. C.* 732.

A party entering bonâ fide under warrant of commissioners of the Southwark Court of Requests, is entitled to fourteen days' notice of action.

PLEA in trespass, justifying, as entering for the purpose of searching for a party under a warrant signed by the commissioners of the Southwark Court of Requests, under 46 Geo. 3, c. 87, s. 21. The Court held, that, having entered bonâ fide for such purpose, defendant was entitled to the fourteen days' notice of action.

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WATERHOUSE *v.* KEEN, E. T. 1825. K. B. 4 *B. & C.* 200.

So a toll collector who exacts too large a toll is entitled to notice of action under the words, "any person for anything done in pursuance of the act;"

BY a turnpike act, it was enacted, "That no action should be commenced against any person for anything done in pursuance of the act, until twenty-one days' notice should be given to the clerk of the trustees, or after sufficient satisfaction, or tender thereof had been made to the party aggrieved, or after six calendar months next after the fact committed; and that every such action should be brought in the county or place where the matter should arise, and not elsewhere; and the defendant should and might, at his election, plead specially, or the general issue, not guilty, and give in evidence that the same was done in pursuance and by authority of the act." It appeared, that a stage coach drawn by four horses, passed through a gate erected under this act of Parliament, and paid the toll. In the evening of the same day, the same coach repassed through the same gate, with the same coachman, but with different horses and passengers. The toll-keeper charged a second toll in respect of the carriage and horses. In assumpsit for money had and received, the Court held, that the toll-keeper was entitled to twenty-one days' notice of action.

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HOPKINS *v.* CROWE, E. T. 1836. K. B. 4 *Ad. & E.* 774; S. C. 7 *C. & P.* 373.

but under the 5 & 6 Will. 4, c. 59, a party is not entitled to notice when he is the principal causing the arrest to be made*.

A HIRED driver of a cabriolet having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said, that if the complainant charged the driver with cruelty to the horse, he would take him into custody. The complainant said, "I do;" and the policeman apprehended the driver, under stat. 5 & 6 Will. 4, c. 59, s. 9. The Court held, that the complainant must be considered not as a party

thing done in pursuance of this act, notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action."

* Nor is an official assignee, under 6 Geo. 4, c. 16, s. 44. (*Knight* v. *Turquand*, M. T. 1836, Ex., 2 M. & W. 101).

giving information to the officer, in consequence of which the driver was arrested, but as a principal causing the arrest to be made, and that he was not entitled to the notice of action which the statute requires to be given to persons suing for anything done in pursuance of it.

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LIDSTER *v.* BORROW, H. T. 1839. Q. B. 1 *P. & D.* 447.

Nor a gamekeeper, though registered before, 1 & 2 Will. 4, c. 32.

IN trover, it appeared that the defendant had seized the dogs in in the due discharge of his duty, as a gamekeeper. To prove his appointment as a gamekeeper, a deputation was put in, dated 1814, and duly registered. It was then contended, that the plaintiff must be nonsuited, as he had given the defendant no notice of action, pursuant to 1 & 2 Will. 4, c. 32, s. 47.

To this it was objected, that the defendant was not within the protection of the act, as he had not taken out a fresh deputation under the act.

*Per Cur.*—It has been decided in *Bush* v. *Green*, 4 Bing. N. S. 41, that a gamekeeper, acting under a deputation, granted and registered before the new act, was not entitled to notice of action. And we concur in that decision.

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## II. FORM AND REQUISITES OF*.

GIMBERT *v.* COYNEY, T. T. 1825. Ex. 1 M'*Clel. & Y.* 469.

The form of the notice of action is immaterial, provided it be intelligible.

A NOTICE of action had been given to the defendant as a justice of the peace, under the 24 Geo. 2. c. 44., when it was objected, that it was vitiated by being in the form of a declaration; but the Court overruled the objection, saying, that the act requires, "that in the notice shall be clearly and explicitly contained the cause of action which the party hath or claimeth to have." It was objected, that it did contain the cause of action clearly and explicitly; because, in fact, it was in the form of a declaration, and comprised not only the specific complaint, but all that redundancy and those general averments which the experience of pleaders had led them to introduce into that description of pleadings. But, notwithstanding the notice includes more than was necessary; it expresses clearly and explicitly enough the real cause of action.

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NORRIS *v.* SMITH, T. T. 1839. Q. B. 2 *P. & D.* 353.

And unconditional, and that

UNDER a local stat. 50 Geo. 3, c. 149, the trustees of a lighting and paving act, were entitled to a certain number of days' notice of

* The notice prior to the Uniformity of Process Act ought to have stated the kind of writ intended to be sued, out, as a latitat, bill of Middlesex, &c. (*Lovelace* v. *Curry*, 3 T. R. 631), but this requisition cannot now be enforced, as there is since that statute only one species of available process. It must correctly and distinctly disclose the cause of action; (*Aked* v. *Stocks*, 4 Bing, 509; *post*, 88): but need not describe the form, (*Sabin* v. *De Burgh*. 2 Campb. 196); but if it do, and state it inaccurately, the variance will be fatal, (*Box* v. *Jones*, 5 Price 168).

And so in actions against excise and custom-house officers; see 28 Geo. 3, c. 37; 3 & 4 Will. 4, c. 53; and 7 & 8 Geo. 4, c. 53.

It is doubtful, whether describing the party as of his place of business, and where servants only sleep, suffices as a description of his place of abode. (Lord *Tenterden*, C. J.—*Johnson* v. *Lord*, M. T. 1830, N. P. 1 M. & M. 444).

the action will be commenced at the expiration of the time stated;

action for anything done in pursuance of the act. The notice of action was given by the plaintiff's attorney in the form of a lette "I am directed by A. B. to request you will forthwith give up the names of the person, or persons, said to have made a complaint to the trustees for lighting, &c. the parish of &c., and upon which you did, on &c., serve A. B. with a notice, charging him with keeping a disorderly house, &c.: unless you do, A. B. will consider you the author of such notice, (which I conceive to be libellous), and I will take proceedings against you accordingly."

*Per Cur.*—The notice is bad, because it is conditional. In *Lewis v. Smith,* Holt, N. P. 127. *Gibbs,* C. J., decided, that a letter from the plaintiff's attorney, that he was instructed to take legal proceedings unless goods were delivered up, was not sufficient notice. So, in the present case, the attorney states, that, unless the name of the party making the complaint is stated, proceedings would be taken against the defendant; and *Patteson,* J. considered the notice, bad, as it should have specified that the action would be commenced at the expiration of the number of days mentioned in the act.

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GIMBERT *v.* COYNEY, T. T. 1825. Ex. 1 *M'Clel. & Y.* 469.

and may be in the form of a declaration;

IN this case, the Court said, that the act of the 24 Geo. 2 requires, that in the notice shall be clearly and explicitly contained the cause of action which the party has or claims to have. It was objected, that it did not contain the cause of action clearly and explicitly; because, in fact, it was in the form of a declaration, and comprised, not only the specific complaint, but all that redundancy and those general averments which the experience of pleaders has led them to introduce into that description of pleadings. But we think that no objection.

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GIBBS *v.* STEAD, T. T. 1828. K. B. 8 *B. & C.* 528.

and one for local trespasses, if it be correct in fact, though not accurate as a technical description of the premises, suffices;

NOTICE of action to defendant, a collector of taxes, had been given for breaking and entering the plaintiff's house, which described the premises as in West Square, Lambeth, which would be a correct description of the house in popular meaning, was held to be sufficient, although the strictly legal and correct description would be, "In the parish of Saint George the Martyr;" and which description the plaintiff gave it in his declaration.

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AKED *v.* STOCKS, H. T. 1828. C. P. 4 *Bing.* 509; S. C. 1 *M. & P.* 346.

but a misdescription of the warrant alleged to have been illegally granted, will vitiate the notice.

ACTION of trespass for illegally granting a warrant. The notice stated the warrant to have been directed to J. B., and on its being produced on the trial, it was found to have been directed to G. H.

*Per Cur.*—The stat. 24 Geo. 2, c. 44, must be construed strictly in favour of magistrates. The plaintiff might have seen the form of the warrant; the statute gives him power to apply for a copy of it; and the fifth section provides, that no evidence shall be permitted to be given by the plaintiff on the trial of any such action as aforesaid of any cause of action, except such as is contained in the notice.

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TOWSEY *v.* WHITE, H. T. 1826. K. B. 7 *D. & R.* 810; S. C. 5 *B. & C.* 125.

So when given under a particular statute, it must shew the party was "*acting* in execution of the act."

BY 3 Geo. 4, c. 126, s. 65, it is enacted, that no trustee of any turnpike road shall have any share or interest in, or be in any manner directly or indirectly concerned in any contract or bargain for making or repairing or in any way relating to the Board for which he shall act; nor shall any such trustee let out for hire any waggon, wain, cart, &c., or any horse, &c., for the use of any turnpike road for which he shall act as a trustee, nor by himself or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee of such road, and that every trustee so offending shall for every such offence forfeit 100*l.* Sect. 143 enacts, that if the penalty shall exceed the sum of 20*l.*, it shall be recoverable by action of debt in any of the superior courts; and the plaintiff, if he recover in any such action, shall have full costs; provided, that there shall not be more than one recovery for the same offence, and that twenty-one days' notice be given to the party offending previously to the commencement of such action, and that the same be commenced within three calendar months after the offence for which such action is brought shall have been committed.

In an action of debt for penalty, it appeared, that one of the trustees had let his horse and cart for the purposes of the statute. In the notice of action it was not stated that the defendant, at the time when he let his cart and horses to hire, was a trustee acting in execution of the act:—Held, that the notice was therefore bad.

## III. BY WHOM TO BE GIVEN, AND DESCRIPTION* OF THE PARTY GIVING IT.

JAMES *v.* SWIFT, M. T. 1825. K. B. 4 *B. & C.* 681; S. C. 6 *D. & R.* 625; 2 *C. & P.* 237—S. P. MAYHEW *v.* LOCKE, T. T. 1816. C. P. 7 Taunt. 63.

A notice may be given by attornies in partnership, and need not contain the Christian names of the members of the firm;

THE notice of action to the defendant, a magistrate, was signed by a firm of two attornies, who were in partnership, thus: "T. & W. A. Williams." The attorney on the record was T. A. Williams. It was objected, that the notice should have been given by the attorney on the record, or, at least, that the Christian names should have been given; but the objection was overruled at Nisi Prius, and the overruling affirmed in banc.

* The statute requires the notice to be *indorsed* with the name, &c., of the party's attorney or agent. The name and place of abode, however, appearing on the *face* of the notice, is a sufficient compliance with the enactment. (*Crooke* v. *Curry*, 5 Burn's J.; *D. & W.*; Ed. 70). Saying "of Birmingham," without further description, suffices; (*Osborn* v. *Gough*, 3 B. & P. 551); but it must be correct in its statement; hence "London," instead of "Westminster," vitiates the notice; (*Stears* v. *Smith*, 6 Esp. 138); and must purport to describe the place of business or of abode, and not merely the place where signed. (*Taylor* v. *Fenwick*, 3 B. & P. 553, n.)

DE GONDOUIN *v.* LEWIS, E. T. 1839. Q. B. 2 *P. & D.* 283.

and where it may be given by the "attorney or agent:"—Held sufficient to sign as "A. B., solicitor, acting on behalf and as the *prochein amy* of the plaintiff."

A CUSTOMHOUSE officer took by force from under the arm of a passenger landing from a vessel a portfolio, containing school drawings, without making any previous demand. In an action of trespass, the notice of action given to the defendant was signed by "A. Pilcher, solicitor," (who was the attorney conducting the suit), acting in the behalf and as the prochein amy of the plaintiff; it was contended for the defendants, that, as an infant could not appoint an attorney, the notice was bad.

*Sed per Cur.*—There is nothing in the objection; for the prochein amy stands in the place of the attorney, and an attorney appointed by him would not be the attorney on the record.

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ROBERTS *v.* WILLIAMS, M. T. 1835. Ex. 4 *D. P. C.* 486; S. C. 5 *Tyrw.* 583.

Indorsement of place of *office* or of place of actual residence suffices.

IN an action against a magistrate, the notice of action was given by the attorney of the plaintiff, who gave his place of business, and not his place of abode. It was thereupon objected, that there was not a sufficient description of the place of abode of the attorney. *Bolland,* B., before whom the cause was tried, reserved the point; and the plaintiff had a verdict.

*Per Cur.*—That either will do, the place of residence or the place of business, one argument urged at the bar was this: that where several persons in partnership are carrying on their business at some one specified place, but all residing in different places, very great inconvenience would ensue if it were necessary that the notice must specify all those places of residence, and the defendant were thus obliged to go to several different places to tender amends. After some doubt, therefore, we have come to the conclusion, that the place of business is a sufficient place of the attorney's abode within the meaning of the act.

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## IV. TIME, IN HOW CALCULATED*.

YOUNG *v.* HIGGON, H. T. 1840. Ex. 6 *M. & W.* 49; S. C. 8 *D. P. C.* 213.

The month is computed exclusive of the day of serving

TRESPASS against a justice. Plea, not guilty (by statute). The notice of action was served on the 26th of March, 1838. The writ was sued out on the 26th of April. It was objected, that the writ

* Formerly, the general rule was, that the computation from an act done must include the day when done; (3 T. R. 633; 3 East. Rep. 407); but that, "from the day of the date," excludes the day. (2 Campb. 294). But now, the general rule is to exclude the first day, at least when the act was not done to the plaintiff himself, and therefore he might not know of it immediately. (15 Ves. Rep. 248; 9 B. & C. 134; see *Hunt* v. *Hislop,* 1 Ad. & E. 577). If plaintiff be discharged from prison on the 14th of December, the commencement of his action on the 11th of June is in time. (9 B. & C. 603). A month in statutes and legal matters means *lunar.* (6 T. R. 224). The month begins on the day the notice is served. (See *Hardy* v. *Ryle,* 9 B. & C. 603; *Pellew* v. *Inhabitants of Wenford,* 9 B. & C. 134); and, therefore, if notice be served on the 28th of April, it expires on the 27th of May; and the action may be commenced on the 28th), (3 T. R. 623; 2 Campb. 294; 1 N. & M. 52). And the issuing of the writ is the commencement of the action. (2 D. P. C. 93).

had been prematurely issued. The judge reserved the point, with liberty to move for a nonsuit; and, on an application for that purpose, the rule was made absolute; the Court being of that opinion.

the notice and the day of suing out the writ.

## V. HOW AND ON WHOM TO BE SERVED*.

## VI. EVIDENCE CONNECTED WITH†.

BUTLER *v.* FORD, T. T. 1833. Ex. 1 *C. & M.* 662; S. C. 3 *Tyrw.* 677.

THE act for paving, watching, and lighting the town of Leamington, authorized commissioners to appoint surveyors, scavengers, rakers, &c., beadles, constables, watchmen, and other officers, and declared, that it should be lawful for such watchmen to secure all malefactors, &c., and all suspected persons, who should be found wandering or misbehaving themselves during the hours of keeping watch; and it was further enacted, that the watchmen should be sworn in as constables, and be invested with the like powers and authorities, &c., as any constables were invested with or enjoyed by law; and that no action should be commenced against any person or persons for anything done or to be done under or by virtue of that act, until a month's notice of action had been given. The Court held, that the defendant, who had apprehended the plaintiff on reasonable ground of suspicion that he had committed a felony, but had beat him, and used more violence than was necessary to secure him, upon proof that they had acted as constables and watchmen under the statute, were within its protection, and entitled to a month's notice of action.

Parties holding the official appointment which confers on them the right to notice, is primâ facie evidence that they are entitled to it, although it might afterwards be shewn that they were guilty of an excess of authority.

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WELLS *v.* ODY, E. T. 1835. Ex. 2 *C., M., & R.* 128.

TRESPASS for building upon the plaintiff's wall. The defendant pleaded the general issue, and proved that it was a party-wall, and that he acted under a bonâ fide impression, that the provisions of the Building Act, 14 Geo. 3, c. 78, s. 43, justified him in so doing; and the plaintiff was nonsuited for not having given a notice of action pursuant to sect. 100. It was held, that the evidence was properly given under the general issue, and that the defendant was entitled to the protection of the Building Act, though he might not strictly have pursued the course pointed out by its enactments.

The want of notice of action is available under the general issue, not guilty.

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LESTER *v.* JENKINS, T. T. 1828. K. B. 8 *B. & C.* 339.

THE cause of action accrued on the 1st of February, after the first day of Hilary Term, (the declaration being intitled generally of Hilary Term); and the attorney on the trial proved, that he

The attorney may prove the time when an action was com-

* The notice to justices, &c., must be delivered to the party or left at the usual place of his abode.

† The service of notice of action when required must be shewn as a foundation for the other proofs. (*Johnson* v. *Lord*, M. T. 1830, N. P., 1 M. & M. 444).

menced, without producing the writ to shew that the action is not brought before expiration of notice*.

received no instructions to commence the action until after the 1st of February, but the writ was not produced. This was held to be sufficient evidence that the action was not commenced until after that day.

The Court observing, that even the writ, if produced, would not of necessity show when it was issued, the test would be nothing for this purpose; but then there is the indorsement. That, however, is a declaration made by the attorney as to his name and place of abode. The act of parliament orders him to indorse the writ in that respect; and by another act of parliament the officer signing it is ordered to mark the day. But the attorney in practice fills up the writ and takes it to the office; and when an attorney says, "I had no instructions to commence any action until after such a day," it is merely evidence that the action was not commenced until afterwards.

## VII. EFFECT OF WANT OF.

TOWSEY *v.* WHITE, H. T. 1826. K. B. 5 *B. & C.* 125.

When notice of action should be given, its omission is a bar to the plaintiff's right of action altogether†.

A NOTICE of action, given under the 3 Geo. 4, c. 125, being defeated for not stating, that the party "was acting in the execution of the act;" it was contended, that the effect of the notice being defective, or omission to give the notice, subjected the party to his loss of costs.

*Sed Per Bayley*, J.—I am of opinion, that the effect of a plaintiff's omitting to give any notice, or to give such a notice as the act requires, is to deprive him, not merely of the right to recover costs, but to recover at all.

**Adding Bail.** See tit. *Bail.*

**Adding Counts.** See tit. *Declaration.*

**Adding Pleas.** See tit. *Pleas.*

**Additions and Residence of Parties.** See tits. *Affidavit—Bail—Capias, Writ of—Distringas, Writ of—Indictment—Summons, Writ of.*

**Adjournment.** See tit. *Sessions.*

* The point cannot now arise, as the record discloses the day when the writ issued. (H. T. 4 W. 4; and is conclusive as to the time, 5 D. P. C. 100).

† And the plaintiff nonsuited under the general issue. (*Wells* v. *Ody*, p. 91).

**Adjournment Day.** See tit. *Trial.*

**Adjournment of Trial.** See tit. *Trial.*

**Adjustment.** See tits. *Account stated—Insurance.*

**Admeasurement.** See tits. *Common—Dower—Inclosure.*

**Administering Drugs to procure Abortion.** See tit. *Abortion.*

**Administering Poison with Intent, &c.** See tit. *Murder.*

## Administration *.

See also tit. *Executors and Administrators.*

ARCHBISHOP OF CANTERBURY *v.* TAPPEN, E. T. 1828. K. B. 8 *B. & C.* 151; S. C. 2 *M. & R.* 136; S. C. 3 *Addams.* Ecc. Rep. 68.

The customary bond to the ordinary is not forfeited by nonpayment of the residue over to parties entitled on distribution until after a decree of the ecclesiastical court.

ACTION upon the common administration bond, conditioned to make and exhibit a true inventory, administer according to law, make a just account, and pay the residue to such person as the ecclesiastical judge shall decree.

The Court, after recapitulating the pleadings, observed: That the question of law for our decision is, whether the neglect or refusal of the administrator to distribute the surplus or residue of the intestate's effects among the next of kin, according to the Statute of Distributions, without being previously cited before the ecclesiastical court, and a decree to that effect being pronounced, is or is not a breach of the condition of the administration bond†. The question is, not whether such neglect or refusal is generally a breach of the duty of an administrator, but whether it is a breach of the condition of the administration bond, and we are all of opinion that it is not. The form of the administration bond is given by the statute, 22 & 23 Car. 2, c. 10, and the section containing the form of the bond is immediately followed by the section directing the mode of distribution, namely, according to the decree of the judge or ordinary. But the plaintiff contends, and the argument on his behalf was to the effect, that an administrator cannot be said well and

* *Of the parties entitled to administer.*—By 31 Edw. 3, s. 1, c. 11, the ordinary shall depute the next and most lawful friends of the dead person intestate to

† See 1 Salk. 315; 3 Atk. 248; Cowp. 140.

truly to have administered the effects of the intestate until he had shared the surplus amongst the next of kin. But the condition of the bond does not bind him to pay over the surplus; that only binds him, the effects, &c. well and truly to administer according to law; and to make a true and just account of his administration, and then afterwards the rest and residue of the goods, &c. to deliver and pay to such persons as the judge by his decree shall appoint.

administer his goods; and the 21 Hen. 8, c. 5, s. 3, provides that, in case any person die intestate, or that the executors named in any testament refuse to prove it, the ordinary shall grant administration to the widow of the deceased, or to the next of kin, or to both, as by the discretion of the same ordinary shall be thought good; the same section further provides, that where divers persons equal in degree of kindred to the deceased, claim administration, the ordinary shall be at liberty to accept any one of them.

The husband has a right, exclusively of all others, to be the administrator of his wife, (1 Saund. Rep. 265), even though the marriage be voidable, unless sentence of nullity be declared before her death, (Cro. Eliz. 472); but he is not entitled to administration if the marriage be void ab initio, as if the wife be of unsound mind. (2 Phil. Rep. 69). A widow has not an absolute right to be appointed administratrix to her husband; the ordinary has his election to grant it to her, or to the next of kin, or he may grant it to them both jointly, (1 Str. 525). If a bastard, who is nullius filius, and has no kindred, dies intestate, and without wife or child, the crown is entitled to administration subject to the debts of the intestate. (3 P. W. 33).

*Administration cum testamento annexo.*—If the deceased makes a will, and appoints no executor, or if through any cause executor fails to act, as if he does not prove the will, or if, after having proved it, he dies intestate without having administered the goods of the testator, the ordinary must grant an administration with the will annexed. (Dyer, 372; Cro. Jac. 614).

*Administration de bonis non.*—If a sole executor die without proving the will, the executorship is not transmissible to his executor, but is wholly determined, and the ordinary must grant administration *cum testamento annexo.* If the executor dies after probate intestate, no interest is transferable to his own administrator; but administration *de bonis non administratis,* (that is, of the goods of the original testator left unadministered), must be granted. (Bro. Abr. "Admin." pl 7). But if he dies before probate, having administered part of the personal estates of the testator, the administration shall not be *de bonis non,* but an immediate administration. (Salk. 305).

*Of limited administrations.*—If an infant be appointed sole executor, or if the right of administration devolves upon him under the statute, an administrator *durante minore ætate* must be appointed. (38 Geo. 3, c. 37. s. 6).

*Administrator pendente lite.*—Where a suit is commenced in the Ecclesiastical Court concerning an executorship or the right of administration to an intestate, the ordinary may appoint an administrator *pendente lite,* who is merely an officer of the Court, and holds the property until the suit terminates. (See 2 P. W. 576; 2 Str. 914). Such an administrator may maintain actions for the recovery of debts; but his authority is confined to the collection of effects, he cannot vest or distribute them, and when the suit is terminated, he must pay over all he has received in the character of administrator to the person pronounced by the Court to be entitled.

*Administrator durante absentia.*—A temporary administration may be granted during the absence abroad of the executor or next of kin, concerning which it is provided, by 38 Geo. 3, c. 87, s. 1, "that at the expiration of twelve months, from the death of the testator, if the executor, to whom probate has been granted, is residing abroad, the Ecclesiastical Court may, upon the application of any creditor, next of kin, or legatee, grant a special administration to such creditor, &c., for the purpose of being made a party to a bill in equity, to be exhibited against him, to carry the decree into effect, or otherwise; and such Court may appoint, while the suit is pending, any person to collect the debts due to the estate." And the 5th section enacts, "that, if the executor shall return, and reside within the jurisdiction of the King's Courts, pending such suit, such executor shall be made a party thereto."

The authority of an administrator appointed under this act, does not terminate and become absolutely void upon the death of the executor, but only voidable. (3 B. & P. 26).

Where administration with the will annexed is granted to a person, as the

ARCHBISHOP OF CANTERBURY *v.* ROBERTSON, T. T. 1833. Ex. 1 *C. & M.* 690; S. C. 3 *Tyrw.* 390.

but the conversion by the administrator of the intestate's effects to his own use, so that they are entirely lost to the estate is a breach of the condition, and the surety in the bond liable for the full amount of the money non-applied.

ACTION upon an administration bond. The defendant pleaded non est factum, upon which the plaintiff took issue, and suggested a breach upon the roll, first, That the administrator did not make a true and perfect inventory of the goods of the intestate; secondly, That he did not well and truly administer according to law the goods of the intestate; thirdly, That he did not make a true and just account of his administration; and lastly, That he did not pay over the residue to the next of kin. It appeared at the trial that the administrator possessed himself of the effects of the intestate; that he applied a part of them in discharge of the debts of the intestate, and of the funeral expenses. He applied another part in payment of one of the next of kin, but there was a large balance amounting to £——, which he had applied to his own use. That he became a bankrupt, and that sum of money was entirely lost to the estate of the intestate.

*Per Cur.*—The question therefore was, under these circumstances, whether the conduct of the administrator is such a breach of that part of the condition of the bond by which he undertook well and truly to administer the effects of the intestate. Looking at the language of the bond, nothing can be more distinct and precise than the terms of the conditions. They are, that he shall well and truly administer, according to law, the effects which shall come to his hands, and all other the effects of the intestate that shall come to the hands of any person, or persons, for him to be administered. It would seem difficult to entertain any doubt upon the natural construction of these words, and nothing would be a more direct infringement of the terms of the condition than the application of the effects of the intestate to his own use, and the converting them to his own purposes, so that they should be entirely lost to the estate of the intestate. Considering, therefore, the condition of the bond, according to the ordinary terms of construction, and according to the natural import of the words, it appears to us that this conduct of the administrator is a breach, and a direct breach of the conditions of the bond. And the only question therefore would be, whether there is anything in the scope and intention of the act of Parliament, or anything in the decisions which have taken place with reference to this subject, to lead us to put upon this condition of

attorney of and for the benefit of the executor, such person represents the testator during the life of the executor, or until he take out probate. *Tanercrop* v. *Day*, T. T. 1838, Q. B., 3 N. & P. 670. Bac. Abr. tit. "Executor and Administrator").

In order to induce the Court to dispense with securities, when required by the practice of the Court, very special circumstances must be produced; and if the Court decree a general grant and require securities as to part only, it will not allow separate bonds, so that other sureties than those justifying may enter into the common bond. (*Howill* v. *Metcalf*, 2 Addams, Ecc. L. 348). If the Court be prayed, at the instance of the parties in distribution, to pronounce an administration bond forfeited, &c., in order to its being put in suit against the sureties to that bond at common law, the question for the Court is not properly the ultimate responsibility of the sureties; it is, generally speaking, the mere fact, of whether the conditions of the bond have or have not been fulfilled. If unfulfilled it will be the Court's duty, generally speaking, to pronounce for the forfeiture of the bond without any reference to that other question of whether the sureties are, or are not ultimately responsible, leaving it to the sureties to plead and prove elsewhere, if they are capable of so doing, that the parties putting it in suit are still, as by their own laches, or otherwise, not in a condition to recover upon the bond, notwithstanding its forfeiture. (*Davey* v. *Edwards & Tapper*, 3 Add. Ecc. Rep. 68).

In assigning a breach upon such a bond, a decree of the ecclesiastical court, directing distribution must be shewn.

the bond an interpretation different from that which its ordinary terms and language in which it is expressed imports. With respect to the other breaches that have been assigned, and upon which nominal damages have been assessed, the first of those breaches is for not rendering and making a full, true, and perfect inventory of the goods of the intestate. It was suggested at the bar, in the course of the argument, that the administrator had a sufficient excuse for not having made and returned such an inventory; because that inventory was to be made and returned upon a particular day, and that no Court sat on that day. Supposing that to be a valid and sufficient excuse, it must have been pleaded in excuse of performance, and could not have been given in evidence without such plea; and we are of opinion, that it could not have been pleaded to a suggestion of breaches; but if the defendant, instead of confining himself to the plea of non est factum, (as he has done in this instance), had thought proper to avail himself of the right which he had to plead further, he might, if this had been a valid and sufficient excuse, have availed himself of it in the shape of a plea by way of excuse of performance; we are of opinion, that he cannot avail himself of it upon this assignment of breaches; and we think, therefore, that the plaintiff is entitled to nominal damages upon the first breach. The same argument and observations will apply also to the third breach, that he did not make a true and just account of the said administration on or before the day named in the bond. In that case also, if the administrator intended to have availed himself of this excuse of performance he should have done it by plea. We are of opinion that he cannot avail himself of this in evidence in the present stage of the proceedings. With respect to the last breach, namely, that he should pay over the rest and residue amongst the next of kin, we are of opinion, that the fourth assignment of breaches is not sufficient; because, by the condition of the bond, it was necessary that the decree of the Court should precede the distribution, and no decree of the Court is stated in the assignment of the breach. We are of opinion, under such circumstances, that there should be no damages assessed upon that breach, and the course will be, as far as relates to that breach, that the jury should be discharged. We are of opinion, upon the whole, that the plaintiff is entitled to nominal damages upon the first and third breaches; and, upon the second breach, the principal subject of argument, that he is entitled to damages, to the full amount of the money that has been misapplied.

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ARCHBISHOP OF CANTERBURY *v.* TUBB, E. T. 1837. C. P. 4 *Scott*, 543; S. C. 3 *Bing. N. S.* 789; S. C. 5 *D. P. C.* 627.

If the bond be put in force without the consent of the nominal plaintiff, the Court will not interfere with respect to the defendant's oyer.

IN an action against the surety, in an administration bond, by creditors of the intestate, brought without the assent of the Archbishop of Canterbury, the obligee, and without the assignment of the bond by him, the plaintiff made profert of the bond. Upon oyer craved, with which the creditors could not comply, as the bond was in the custody of the officer of the Prerogative Court, who would not produce it without the order of the Ecclesiastical Judge, which was refused, or under a subpœna, the Court refused an application, that an authenticated copy of the bond furnished by the

plaintiff, and at his expense, or the production of the bond to the defendant's attorney or agent, at the Register Office at Doctors' Commons, which the Court should direct, should be deemed sufficient oyer, inasmuch as by assenting, they would upon motion interfere with the rights of the Prerogative Court; would deprive that Court of the exercise of its discretion in deciding whether such bond should be put in suit; and enable a party to sue without giving an indemnity; thereby rendering the archbishop, the nominal plaintiff, liable to costs to any amount.

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Doe *d.* Allen *v.* Ovens, E. T. 1831. K. B. 2 *B. & Ad.* 6.

Where a party meets with an accident whilst temporarily resident at a place, and dies in the infirmary there, it is a dying in itinere, and confers no right to grant administration on the diocesan.

The plaintiff claimed as personal representative of A., a person residing in one diocese, who went on business into another diocese, having with him on that occasion property exceeding 5*l.* in value; he there met with an accident, and died in consequence of it. He had no property in the latter diocese, except that which he had with him for the purpose of the journey. The Court held, that a probate of his will, granted by the bishop of the diocese in which he resided, and in which his property lay, was sufficient, he having died in itinere; and the 9th canon 2 Jac. 1, laying down, that, where a man dies on a journey, the goods which are with him at the time of his death are not bona notabilia.

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Lysons *v.* Barrow, H. T. 1836. C. P. 2 *Bing. N. S.* 486; S. C. 2 *Sc.* 721.

A metropolitan administration of goods within a *peculiar*, is not void, but voidable only.

Testator died, leaving bona notabilia in a peculiar within the province of York, and in a diocese within the same province. In an action by the executrix against the defendants, who resided at the time of the death of the testator in the peculiar, for money had and received to her use as executrix, the Court held, that the prerogative administration of the Archbishop of York, under which she sued, was sufficient; as such administration was voidable, not void; and consequently should be held good and valid in a Court of common law*, until impeached by sentence of Ecclesiastical Court.

*See "Williams on Executors,"* 196, n.; *and* 2 *Id.* 1352.]

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Carr *v.* Roberts, M. T. 1831. K. B. 2 *B. & Ad.* 905; S. C. *N. T. P.* 2 *N. & M.* 45; *Semble new rule*, 2 *M. & M.* 45.

The stamp upon letters of administration must be of sufficient amount to cover the sum for which the action is brought.

Action of covenant by the plaintiff, as an administrator. The intestate had granted an annuity to A., and subsequently conveyed his property to the defendant, in consideration of an annuity to be paid to himself, and a covenant to pay the annuity to A. After the intestate's death, his administrator was called upon and paid the annuitant to the extent of assets received by him. The Court held, that the right to recover that sum from the defendant was part of the estate, and in respect of which a stamp was necessary

* Quære—Whether the third resolution of the Court, in *Price* v. *Simpson*, as reported in Cro. Elizabeth, 719, viz. that, in a case like the above, there should be two letters of administration; one from the peculiar, the other from the ordinary; and that the metropolitan should have no prerogative—is to be considered as law.—Semble, it is not; as no notice is taken of such alleged resolution in the reports of the case in 5 Rep. 30, and part 2, fol. 132.

on the letters of administration; and that the intestate in respect thereof, if he had recovered it in his lifetime could not be considered a bare trustee for the annuity, having an interest in its payment.

*See Hunt* v. *Stevens*, 3 *Taunt.* 113; *and see tit.* "*Executors*"—"*Williams on Executors,*" 424; 1343—1344.

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**Admission of Articled Clerks.** See tit. *Attorney.*

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**Admission of Copyhold.** See tit. *Copyhold.*

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**Admission, Evidence by.** See tit. *Evidence.*

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**Admission of Improper Evidence.** See tit. *New Trial.*

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**Admission to sue in Forma Pauperis.** See tit. *Pauper.*

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**Admission, by Payment of Money into Court.** See tit. *Payment of Money into Court.*

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**Admiralty*.** See tits. *Certiorari—Habeas Corpus—Prohibition.*

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* The Admiralty has exclusive jurisdiction of all offences committed on the high seas, and within the harbours, and creeks, and havens of foreign countries; but within the harbours, creeks, and havens of this country, the Courts of common law, and not the Admiralty, have jurisdiction; as, for instance, if an imaginary line were drawn across the mouth of such creek, &c. from one point of land to the other, of all offences committed within such line the common law would have jurisdiction; but all offences committed without the line, would be within the jurisdiction of the Admiralty. As to the sea-shore below low water-mark, the Admiralty has exclusive jurisdiction; above high water-mark, the Courts of common law have exclusive jurisdiction; and between high and low water-mark, the Courts of common law and Admiralty have alternate jurisdiction—the Courts of common law have jurisdiction of all offences committed on the strand when the tide is out; the Admiralty, jurisdiction of offences committed on the water when the tide is in.

By 9 Geo. 4, c. 31, s. 8, where "any person feloniously stricken, poisoned, or otherwise hurt upon the sea, or, at any place out of England, shall die of such stroke, poisoning, or hurt, in England; or, being feloniously stricken, poisoned, or hurt at any place in England, shall die of such stroke, poisoning, or hurt, upon the sea or any place out of England," the offender, and all accessaries before or after the fact, may be tried, &c. in the county or place in England where the death, stroke, poisoning, or hurt, shall happen, in the same manner as if the offence had been wholly committed in that county or place.

Also, by 3 & 4 Will. 4. c. 53, s. 77, offences committed on the high seas against any act relating to the customs, shall, for the purpose of prosecution, be

**Ad quod Damnum, Writ of.** See tits. *Highway—Indictment—Nuisance.*

**Adulteration of Bread and Flour.** See tit. *Bread.*

## Adultery*.

(1 *Peters. Abr.* 288).

MELLIN *v.* TAYLOR, T. T. 1836. C. P. 3 *Bing. N. S.* 109; S. C. 3 *Scott*, 513.

A new trial has been granted, on payment of costs, where the finding was greatly against the weight of evidence.

IN an action for adultery, witnesses proved beyond question many secret interviews between the parties, and several distinct acts of adultery under circumstances of peculiar grossness; on one occasion, on a stile in a public and much-frequented footpath; on another, in the library of the plaintiff's house with the door unfastened; and further, that, during the plaintiff's absence from home, the defendant came one night to the plaintiff's house, after all the servants were supposed to be in bed, and was admitted by the plaintiff's wife, the defendant taking off his boots in the garden and walking into the house with them in his hand, and retiring in the same manner at two o'clock in the morning. Some further witnesses were called on the part of the defendant, for the purpose of shewing the felicitous terms upon which he lived with his own

deemed to have been committed in the place or land in the United Kingdom into which the offender shall be carried or in which he shall be found.

As to examination and commitment by justices, see 7 Geo. 4, c. 38, and 9 Id. c. 31, s. 7. As to trial and punishment of offences committed at sea, see 1 Vict. c. 85, s. 16; 7 & 8 Geo. 4, c. 28, s. 2.

Where a foreigner signed a ship's articles for a voyage, and whilst abroad was taken by the captain on shore, and both ceased to serve on board, and in a quarrel some time afterwards struck one of the crew a blow on land, which occasioned death, on the party being taken on board:—Held, first, That the prisoner was not to be considered at the time a British subject, within the 9 Geo. 4, c. 31, s. 7: and, secondly, That the death happening on board, the offence was not committed on land out of the United Kingdom. (*Rex* v. *Mattos*, 7 C. & P. 458).

A special contract for seamen's wages cannot be enforced in the Admiralty Court, that tribunal having no jurisdiction over special agreements. (*Sydney ove*, 2 Dods. 11).

The jurisdiction over a prize cause continues in the Prize Court of Admiralty, although the prize may have been taken after the time limited for the cessation of hostilities. (*Harmony*, 2 Dods. 78).

The Court of King's Bench will not grant a prohibition to restrain the Admiralty Court from proceeding in a suit instituted by several part-owners of a ship against one, for the possession of the ship's register. (*Anon*, 3 D. & R. 178, n.; S. C. 2 Chit. 359).

The Court of Admiralty has authority to arrest and detain a ship, upon the application of a part-owner, who dissents from her intended employment, until security be given from the other part-owners to the full value of his share. (*Apollo*, 1 Hag. 306.)

* The foundation of an action for criminal conversation is the injury accruing to the husband by the alienation of the affections of his wife, deprivation of her society, and imposing on him a spurious issue. Considerable uncertainty appears to have prevailed as to the proper form of action to be adopted; whether it should be trespass vi et armis, (7 Mod. 29; Bac. Ab. "Marriage"), or an action on the case.

family. The jury found for the defendant. On motion for a new trial:

*Per Cur.*—We think the rule should be granted for a new trial, on the ground of the verdict being against the weight of evidence, upon the usual terms. Strong observations have been made, that we cannot have the opportunity of giving an opinion on the demeanour of the witnesses at the trial. It is an observation which would apply to every case of a motion to the Court, as to some of the judges, if not to all. But, in this case, the learned Judge who presided at the trial had that opportunity; and he has reported to us, that he is not satisfied with the verdict; a course which has in it no novelty whatever, but has been the constant practice from the earliest time at which new trials have been granted, and is acted upon every day.

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HETHERINGTON *v.* GRAHAM, T. T. 1829. C. P. 3 *M. & P.* 399; S. C. 6 *Bing.* 135.

A wife by voluntarily leaving her husband during coverture, and without his consent, lives away from him in adultery with W. C.

A PLEA in bar to a writ of dower unde nihil habet, alleged, that the wife during her coverture voluntarily left her husband, and without his consent lived away from him in adultery with W. C.

(2 Salk. 428; 2 Lord Raym. 831). The preponderance, however, of judicial determination and collateral peculiarities appear in favour of the latter mode of proceeding: first, Because the injury complained of is not immediate, but consequential; the gist of the action not being the supposed assault on the wife, but the consequent corruption of the body and mind; (6 East, Rep. 387); secondly, the plea of the Statute of Limitations is not guilty within six years; (2 Burr. Rep. 753); thirdly, The wrong may be alleged in the declaration as having been committed on divers days and times, which would be improper in an action of trespass for an assault and battery; (6 East, 391); and lastly, The plaintiff is entitled to full costs, though he may not recover 40*s.* damages. (1 Salk. 206). Sed vide 3 & 4 Vict. c. 24).

In order to support a suit for criminal conversation, it is essential that the wife should not have been permitted, with the concurrence or privity of the husband, to live in a state of promiscuous and indiscriminate prostitution; (Peake, N. P. 39); and the husband should appear before the Court uncontaminated and without imputation of having assented or been instrumental to the defendant's criminal intercourse with his wife; (4 T. R. 651); and such a suit is not sustainable for any act of adultery after the husband has surrendered all claim to her society and assistance, upon an agreement and subsequent separation; (5 T. R. 357); though, in a subsequent case, the propriety of this doctrine was questioned. (6 East. Rep. 244).

The identity is sufficiently proved when the witness who produces the copy of the register states that he knows the handwriting of the parties to the register. (*Bain* v. *Mason*, H. T. 1824, N. P., 1 C. & P. 203).

In such an action, a witness may be asked whether the wife did not keep a journal, and whether she stated for what purpose she kept it. (*Tindal*, C. J.—*Jones* v. *Thompson*, H. T. 1834, N. P., 6 C. & P. 415). A journal, written by the wife during her voyage, may be read, to shew her mode of thinking and speaking of her husband, when the adultery takes place on board a ship. (*Jones* v. *Thompson*, H. T. 1834, N. P., 6 C. & P. 415). So, complaints of the wife as to the manner in which the husband treated her are admissible to prove the terms on which the parties lived; (*Winter* v. *Wroot*, 1834, N. P., M. & Rob. 404; S. C. *by the name of Winter* v. *Wain*, 4 C. & P. 494); and the draft of an answer by the wife to a letter from a friend, on the subject of rumours injurious to the character of the wife, in the defendant's handwriting, is admissible. (*Wilton* v. *Webster*, 1835, N. P., 7 C. & P. 198). So letters written by the wife to third persons before she became acquainted with the adulterer, are admissible to shew the affectionate terms on which she and her husband lived; (*Willis* v. *Bernard*, H. T. 1832, N. P., 5 C. & P. 342); but letters written by the wife to the husband after the attempt at adultery by the defendant cannot be received. (Id.). So it is no defence to shew that the wife is an actress, that the marriage was concealed, and

The demandant in her replication alleged, that, although true it was that she voluntarily and of her own accord left her husband, yet that she left him with his consent for that purpose granted, and separated from him; and that such separation continued with their mutual consent until the death of the husband, and that, if any act of adultery took place, it was after her separation from her husband, and during the period of such separation by their mutual consent. The tenant in his rejoinder traversed the replication, and re-asserted the statement in the plea. On demurrer—

band, and living in adultery, forfeits her claim to dower.

*Per Cur.*—That the adultery of the wife was no bar of the wife's dower at common law, is expressly laid down by Lord *Coke*, in his reading on the 13 Car. 2, c. 34, in the Second Institute. Indeed, it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the Courts of common law took no cognizance. But it is enacted by the stat. 13 Edw. 1, c. 34, that, "if a wife willingly leave her husband, and go away and continue with the adulterer, she shall be barred for ever of an action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon."

There is a direct authority, that all the circumstances mentioned in the statute need not concur in form, provided they do in substance: for Lord *Coke* lays it down, that, albeit the words of this branch be in the conjunctive; yet if the woman be taken away not sponte, but against her will, and after consent and remain with the adulterer, without being reconciled &c., she shall lose her dower. It ought not to be forgotten, that Britton, whose book was published immediately after the framing of this statute, in treating of a writ of dower brought against the heir and his guardian, says: "The heir may say, she hath forfeited dower of her husband by her adultery; for she went from her husband to another bed after she had married him, and so forfeited her dower."

And as we think that good sense and reason concur with these authorities, we hold the proper construction of the statute to be what the words will warrant, viz. that if a woman leaves her husband with her own free will and afterwards lives in adultery, the dower is forfeited.

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BAYNON *v.* BATLEY, H. T. 1832. C. P. 1 *M. & Scott*, 339; S. C. 8 *Bing.* 256.

DECLARATION in covenant, that, by a certain indenture then and there purporting to be made between the plaintiff, the defendant, and others, it was witnessed that the defendant did covenant &c. to pay a certain sum yearly by way of separate maintenance for his wife; to which the defendant pleaded, that, after the making of the indenture, the wife had committed adultery with one A. Y.

But to an action by the trustee of a settlement, a plea that the wife committed adultery with A. B. after the settlement was made, is no bar.

On demurrer, the case of (*Gee* v. *Thirston*, 2 B. & Cr. 547), was relied on, where it was held that such indenture was valid in law, and that a plea by the husband that the wife had instituted a

she lived like a single woman, and continued to perform in her maiden name. (*Calcraft* v. *Harborough*, H. T. 1831, N. P., 4 C. & P. 499).

To increase or diminish the damages, evidence is not admissible as to the nature and extent of the defendant's property. (*James* v. *Biddington*, 1824. N. P.; 6 C. & P. 589). The death of the wife after commencement of the action does not preclude the husband from recovering damages for the injury to his feelings and the loss of her society to the time of her death. (*Wilton* v. *Webster*, 1835, N. P., 7 C. & P. 198).

suit in the Ecclesiastical Court for restitution of conjugal rights, in which cause he had put in an allegation and certain exhibits, charging her with adultery, and that a decree of divorce a mensa et thoro was thereupon pronounced by that Court, was no answer to an action by the husband for arrears of the annuity.

And the Court gave judgment for the plaintiff.

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MEYER *v.* HAWORTH, T. T. 1838. Q. B. 8 *A. & E.* 467.

To a plea of coverture plaintiff cannot reply that the defendant was separated from her husband living in adultery, without the plaintiff's knowledge, and that the defendant, after her husband's death, promised to pay.

To an action for goods sold, the defendant pleaded coverture, to which the plaintiff replied, that the defendant was at the time of the contract separated from her husband, and living in open adultery; that the plaintiff did not know of the marriage or adultery; and that defendant, after her husband's death, and before action, in consideration of the promises, promised to pay. On demurrer—

*Per Cur.*—The replication is bad; there is no consideration for the promise; besides, it is a departure. The replication does not support the declaration; the promise in the declaration was altogether void; this is not like the case of an infant, whose promise is voidable only.

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SYMES *v.* GOODFELLOW, H. T. 1836. C. P. 2 *Scott*, 769; S. C. 4 *D. P. C.* 642.

Where an arbitrator, under the plea of non-assumpsit, received evidence of adultery, the Court refused to set aside the award.

THE defendant pleaded non assumpsit to an action for boarding and lodging the defendant's wife. The cause was referred to arbitration, and the arbitrator having received evidence, on behalf of the defendant, in answer to the demand for the board and lodging, of acts of adultery by his wife—Motion was made to set aside the award on that ground.

*Sed per Cur.*—It does not appear to us to be quite so clear, that this defence need be pleaded specially; we must confess we do not see the necessity for it; and if there be any doubt whatever on the point, we should not feel disposed to take it out of the hands of the arbitrator.—*Rule refused.*

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REX *v.* FLINTAN, T. T. 1830. K. B. 1 *B. & Ad.* 227.

The 5 Geo. 4, rendering a man liable to imprisonment for not supporting his wife, does not apply where she has committed adultery.

BY 5 Geo. 4, c. 83, s. 3, it is enacted, That every person being able wholly or in part to maintain himself or his family by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he, or any of his family whom he may be legally bound to maintain, shall have become chargeable to any parish, &c., shall be deemed an idle and disorderly person within the true intent and meaning of the act; and shall be punishable with imprisonment and hard labour.

On the question, whether a man who refused to maintain his wife, because she had left him and committed adultery, was liable to be punished under the statute—

*Per Cur.*—If the husband is not obliged to answer for the wife's contracts or to receive her into his house, it cannot be said that he is legally bound to maintain her. That obligation must be made out, and it is not established in the case of a wife who has left her husband, and lives in adultery.

**Advancement.** See tits. *Distribution—Payment—Power.*

**Adverse Claims.** See tit. *Interpleader Act.*

## Adverse Possession*.

The non-payment of rent after twenty years will have the same effect as adverse possession formerly had;

The 3 & 4 Will. 4, c. 27, s. 2, enacts, That, after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

but the mere wrongful receipt of rent, under a lease, does not, on the termination of the lease, give the party any right to the land.

By sect. 9 it is enacted, "That, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action, after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

* This subject is an important branch of English law. The enactments in the 3 & 4 Will. 4, c. 27, (the material clauses of which are copied in the text), have essentially modified and varied the rules, both at common law, as well as the earlier Statutes of Limitation.

By an adverse possession is to be understood an adverse title, based on the ouster, and, in the case of freehold, on the disseisin of the rightful owner. (*Reading* v. *Rawstene*, 2 Ld. Raym. 829; Salk. 422; see Prest. Ab. tit. 334). The latter is defined, by *Littleton*, (sect. 279), to be "where a man enters into lands or tenements, where the entry is not *congeable*, and *ousts* him who hath the freehold, &c.; and the commentator says, every entry is not a disseisin, unless there be an *ouster* of the freehold. Lord *Coke* further says, disseisin is putting a man out of seisin, and ever implies a wrong; but dispossession or ejectment is putting out of possession, and may be by right or wrong. However strict the notion of actual ouster may formerly have been, the exercise of adverse possession is now clearly equivalent to evidence of actual ouster; (see *Doe* d. *Pellat* v. *Ferrars*, 2 B. & P. 542; and 1 Ld. Raym. 741); but the presumption of law is against adverse possession as between privies; and every adverse possession may be rebutted. (*Doe* d. *Fenwick* v. *Reed*, 5 B. & Ald. 232). It is negatived when the parties claim under the same title, (*Page* v. *Seefly*, B. N. P. 102, n. *b*), or where the possession of one party is consistent with the title of the other, (*Doe* d. *Milner* v. *Brightwen*, 10 East, 583), or where the party claiming has never

The possession of one co-parcener &c. is not to be the possession of he others.

The 12th section provides, That, when any one or more of several persons entitled to any land or rent as co-parceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their intended share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

been out of possession, (*Reading* v. *Rawstene*, 2 Ld. Raym. 829), or the possessor has acknowledged a title in the claimant. (*Doe* d. *Pellatt* v. *Ferrars*, 2 B. & P. 542).

The stat. 21 Jac. 1, c. 16, limited the period for all writs of formedon to twenty years, and enacted, that no person should at any time thereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his title should first descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs, should be disabled from such entry after to be made.

The stat. runs against the lord of a manor as well as against any other person. (*Greebey* v. *Preston*, Selw. N. P. 702). Hence, if a house &c. be built upon the waste, the lord should take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. If a cottage is built upon waste in defiance of a lord of a manor, and quiet possession has been had of it for twenty years, it is within the statute; but if it were built at first by the lord's permission, or any acknowledgment have been since made, (though it were 100 years since), the statute of 21 Jac. would not have run against the lord. (B. N. P. 104, cited 3 B. & C. 414). Payment of rent for a piece of waste land after an occupation of thirty years without paying any rent, was held conclusive evidence that the former occupation by the party was a permissive occupation. (*Doe* d. *Jackson* v. *Wilkinson*, 3 B. & C. 413). So, where a cottage standing in the corner of a meadow, (belonging to the lord of the manor), but separated from the meadow and highway by a hedge, had been occupied for about twenty years without any payment of rent, and then, upon possession being demanded by the lord, was reluctantly given up, and was afterwards restored to the party, he being at the time told, that, if allowed to resume possession, it would only be *during pleasure*, and he kept possession for fifteen years more and never paid any rent: it was held, that the jury were warranted in presuming that the possession had commenced by the permission of the lord. (*Doe* d. *Thompson* v. *Clark*, 8 B. & C. 717).

As the stat. James only operated in case of an adverse possession; where one person held an estate on the joint account of himself and another, or by the permission of the real owner, and without claiming any inconsistent right, the original title was not affected. Thus, where one holds lands as lessee, his possession is, in contemplation of law, that of the lessor. (1 Wils. Rep. 176; 3 Id. 521). For length of possession during a particular estate, as under a lease for lives as long as the lives are in being, gives no title; but if the tenant hold over twenty years after the death of cestui que vie, such holding over will in ejectment be a complete bar to the remainderman or reversioner, because it was adverse to his title. (Cowp. Rep. 218). Where the relation of landlord and tenant can be implied, the statute will not run, (2 B. & P. 542), or where the party in possession is tenant at sufferance. (2 D. & R. 38).

The rules on the subject of adverse possession may be conveniently enumerated under the following distinct heads:—

1. As between the claimant and a party who has expressly acknowledged his title.
2. As between parties whose titles are consistent.
3. As between landlord and tenant.
4. As between mortgagor and mortgagees.
5. As between trustee and cestui que trust.
6. As between tenants in common, joint tenants, and co-parceners.

1. *As between the Claimant and a Party who has expressly acknowledged his Title.* —There can be no adverse possession when the party seeking to use it has acknowledged his adversary's title, as where a lord of a manor demised lands to

By sect. 13 it is enacted, That, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

So, possession of a younger brother not to be the possession of the heir.

the rector of the parish for forty years, at a certain rent; and, in the lease, the rector, after covenanting for payment of the rent, further granted to the lord the tithe of oats of the parish; the lease also contained a proviso for re-entry in case the rent should be in arrear, or the lord, his heirs, &c., should be disturbed by the rector, or his assigns, in the receipt of the tithe; and concluded with a covenant, on the part of the lord, that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease. After the expiration of the lease, the rector for the time being continued to hold the land, but withheld the rent for more than twenty years; the heirs of the lord, at the same time, continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of the lord, the latter being portionists of the tithes of the parish: it was held, that the possession of the land by a rector who has not been incumbent twenty years was not adverse so as to let in the operation of the Statute of Limitations. (*Doe* d. *Pellat* v. *Ferrars*, 2 B & P. 542).

2. *As between Parties whose Titles are consistent.*—The title of the parties being consistent prevents the possession being deemed adverse. Thus, A. being seised in fee of an undivided moiety of an estate, devised the same (by will, made some years before her death), to her nephew and two nieces as tenants in common. One of the nieces died in the lifetime of A., and left an infant daughter. A., by another will, intended to have devised the moiety to the nephew and surviving niece and the infant daughter of the deceased niece, but the will was never executed. After A.'s death, the nephew and surviving niece covenanted to carry the unexecuted will into execution, and to convey one-third of the moiety to trustees, upon trust to convey the same to the infant if she attained twenty-one years, or to her issue if she died under twenty-one and left issue, or otherwise to the nephew and niece in equal moieties. No conveyance was ever executed in pursuance of the deed. The rents of the third were received by the trustees for the use of the infant during her lifetime. An ejectment having been brought by the devisee of the nephew more than twenty years after his death, but less than twenty years after the death of the infant; it was held, that there was no adverse possession until the death of the infant, and that the ejectment was well brought. (*Doe* d. *Colclough* v. *Hulse*, 3 B. & C. 757).

A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband which died an infant, the husband was held entitled to hold for his life in the nature of a tenant by the curtesy of England according to the custom of the manor, though the only evidence of such custom on the rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance by the general law of copyhold, and the title of tenant by the curtesy being also by the operation of law.

And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title, though he were admitted after his wife's death to hold to him pursuant to the settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife in ejectment brought within twenty years after the husband's death. And though one-third of the copyhold had been settled many years before upon a third person for life, but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last seised and admitted; and the steward of the manor appointed by the heir at law and her husband, had, in his accounts after the wife's death, (which was evidence of his having done the same in her lifetime) for above twenty years back, debited himself with the receipt of two-thirds of the rent for the husband on account of his wife, and the remaining one-third for such other person claiming under the settlement; yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole, so as to do away the notion of an adverse possession by the husband of that one-third, distinct from his possession of the other two-thirds, as tenant by the curtesy after his wife's death, in answer to a claim by the heir

Acknowledgments in writing, given to person entitled, or his agent, to be equivalent to possession, &c.

Provided always, That, when acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person or persons claiming through him to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

By sect. 15, it is enacted, That when no such acknowledgment as

at law of the wife against the devisee of the husband, who set up an adverse possession for about twenty years after the wife's death.

Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period, nor after his death from the present heir at law, who might be called upon in equity to discover it is given; though such release, if proved or presumed, would bar the copyholder's claim. (*Doe* d. *Milner* v. *Brightwen*, 10 East, 583.

3. *As between Landlord and Tenant.*—Prior to the passing 3 & 4 W. 4, c. 27, s. 3, the mere nonpayment of rent was not alone sufficient to render possession of the tenant adverse to that of his landlord; but the present act by declaring, that a party's right of entry shall be deemed to have accrued on the last day of the payment of rent, will have the effect of making twenty years' possession without payment of rent or any written acknowledgment of right in the owner a bar to his recovering the possession; as the only remedy now is by ejectment, which must be brought within twenty years after the right accrued.

The mere receipt of rent by a stranger without colour of title was not evidence of adverse possession against one who had the legal title; for it was no disseisin, but at the option of the latter, even although the stranger made a lease by indenture reserving rent, unless he made an actual entry. (Bull. N. P. 104; 1 Roll. Abr. 659: and see *Smith* v. *Parkhurst*, Andr. 324; *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68). If there be a tenant at sufferance, and a stranger not having any right to the land make a lease to him by indenture, rendering rent without putting the tenant by sufferance out of possession, and the tenant pay the rent to the stranger—that is not any disseisin to him who has the right. (1 Roll. Abr. 659, (*C*) pl. 11). So, if a tenant at will make a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election. (*Blunden* v. *Baugh*, Cro. Car. 302). For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election. (See 2 Sch. & Lef. 622; 1 Taunt. 599).

Before this act, when there was a valid lease subsisting, the right of entry was preserved until the determination of the lease, although no rent had been received. (*Correll* v. *Maddox*, Runn. Eject. App., No. 1); and even the adverse receipt of rent for more than twenty years did not deprive the party of his right of entry on the determination of the lease. (*Doe* v. *Danvers*, 7 East, 299). Although a void lease, or a term which had become attendant upon the inheritance for the benefit of the owner of it, did not prevent the running of the Statute of Limitations. (*Taylor* v. *Horde*, 1 Burr. 60).

But, where an estate had been in lease, and A. entered and received the rent during the continuance of the lease, and remained in possession more than twenty years from the time of his entry, and another person claiming the estate within twenty years after the expiration of the lease, brought an ejectment and filed a bill for a discovery, it was held, that the possession was adverse, as a bill might have been filed by the parties claiming during the whole time the leases were in existence; and a demurrer to the discovery was allowed, and assistance in equity refused. (*Cholmondely* v. *Clinton*, Turn. & Russ. 107; Shelford's Real Property Acts).

4. *As between Mortgagor and Mortgagee.*—Before the recent act twenty years' possession by a mortgagor could not bar the mortgagee as adverse. Thus, in *Hall* v. *Doe* d. *Surtees*, (5 B. & A. 687), where premises were mortgaged

aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this act.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

See *Holmes* v. *Newlands*, 3 *P. & D.* 128.

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NEAPEAN *v.* DOE *d.* KNIGHT, T. T. 1837. Error. 2 *M. & W.* 894. *See post, tit. Ejectment.*"

IN this case the Court said—We are all clearly of opinion that the 1st and 2nd sections of the 3 & 4 Will. 4, c. 27, have done

Since the passing of the stat.

in fee, with a proviso for a reconveyance if the principal were not paid on a given day, and in the meantime that the mortgagor should continue in possession; upon special verdict it was found, that the principal was not paid on the given day, but that the mortgagor continued in possession; there was no finding by the jury, either that interest had or had not been paid by the mortgagor:—Held, that upon this finding it must be taken, that the occupation was by the permission of the mortgagee; and consequently, that, although more than twenty years had elapsed since default in payment of the moiety, still the mortgagee was not barred by the Statute of Limitations. (See 2 Jac. & W. 188; 6 Mad. 181; S. C. 1 V. & B. 536; and *Doe* v. *Barton*, 3 P. & D. 194).

5. *As between Trustee and Cestui que Trust.*—The possession of the cestui que trust is not adverse against the trustee unless the former has denied the title of the trustee. Thus, in *Keene* v. *Deardon*, 8 East, 243, it was holden, that the possession and receipt of the rent, issues, and profits of a trust estate by a cestui que trust, for more than twenty years after the creation of the trust, without any interference of the trustees, such possession being consistent with and secured to the cestui que trust by the terms of the trust deed, is not adverse to the title of the trustees, so as to bar their ejectment against the grantees of the cestui que trusts brought after the twenty years. But this rule applies only as between cestui que trust and trustee; and not between cestui que trust and trustee on one side, and strangers on the other: for that would be to make the statute of no force at all; because, there is hardly an estate of consequence without such a trust; and so the act could never take place. Therefore, where a cestui que trust and his trustee are both out of possession, for the time limited, the party in possession has a good bar against both. (*Llewellyn* v. *Mackworth*, Barnard, C. P. 445; 15 Vin. Ab. 125, n. to pl. 1.)

6. *As between Tenants in common, Joint Tenants and Coparceners.*—The 12th sect. 3 & 4 Will. 4, c. 27, has changed the rule of law which formerly prevailed, that, as between strangers and one of several joint-tenants, &c. the continuance of seisin in one joint-tenant, or tenant in common, or co-parcener, was a continuance of the seisin in all, so as to prevent the operation of the Statutes of Limitations. (6 Mod. Rep. 44). Therefore, before the possession of one joint-tenant, &c. could be adverse, so as to enable him to maintain an ejectment, he must have done some act amounting to a denial of the right of such co-tenant, or omit some duty from which a jury would infer such denial, before his possession could be adverse and within these statutes.

According to Lord Mansfield, if, upon demand by the co-tenant of his moiety, the other refuses to pay and denies his title, saying, he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough. (Cowp. Rep. 218). And, in a recent case, it was said by the Court, that the possession of one tenant in common, claiming the whole and denying possession to the other, was certainly evidence of an ouster of his companion, and that this was beyond the mere fact of receiving the whole rent, which was an equivocal act. (11 East, 50).

But although joint-tenants and co-partners have a seisin per my et per tout; yet, if there be a disseisin of both, one of them may be barred by the Statute of Limitations, although the statute shall not have effect as a bar to the other of them. (2 Taunt. 397).

3 & 4 Will. 4, c. 27, there can be no non-adverse possession, except in cases provided for by the 15th section.

away with the doctrine of non-adverse possession; and, except in cases falling within the 15th section of the act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession. The 15th section applies only where the possession was not adverse, binding to the former state of the law at the time of the passing of the act; that is, the 24th July 1833.

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DOE *d.* CURSON *v.* EDMONDS, H. T. 1840. Ex. 6 *M. & W.* 295.

An admission of possession being adverse, must be unconditional.

IN ejectment, the defendant a party in possession adversely of certain land, on being applied to by the lessor of the plaintiff to pay rent, and accompanied with an offer of a lease, replied by letter—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made, of paying a moderate rent, on an agreement for a term of twenty-one years." Ultimately, the arrangement was not completed, and no rent paid or lease executed. On the question, whether the facts amount to an acknowledgment of title, under the 3 & 4 Will. 4, c. 27, s. 14, the Court held, that it was no acknowledgment of title, because there was no final bargain.

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DOE *d.* WILKINS *v.* WILKINS, M. T. 1835. K. B. 5 *N. & M.* 434; *Ab. tit. Ejectment.*

If possession be adverse to the wife, it must also be adverse to the husband*.

IN this action of ejectment, Lord *Denman*, C. J., said: If the possession was adverse to the wife, it was also adverse to the husband. The question, whether it was adverse to the wife, was, in fact, identical with the question, whether it was adverse to the husband.

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DOE *d.* HICKMAN *v.* HASLEWOOD, H. T. 1837. K. B. 1 *N. & P.* 352.

A widow residing in a freehold more than twenty years is not an adverse possession, except, perhaps, against the heir.

IN ejectment it appeared that a testator devised as follows:—"I give unto you, my wife, her heirs and assigns for ever, all the residue of my goods, chattels, and personal estate whatsoever and wheresoever, and all my right, title, and interests, of, in, and to all and every sum and sums of money whatever, which now is, are, or shall be due to me upon and in virtue of any bill, bond, or other securities. I do likewise make my wife full and sole executrix of the freehold house situate in Great Queen-street, in the parish of St. Giles." The widow continued to reside in a freehold house of which she was seised for more than twenty years after her husband's death. The Court held, that possession was not adverse, except, perhaps, against the heir, as her possession might be intended to be in respect of dower.

* In *Doe* d. *Tranter* v. *Wing*, 1834, N. P., 6 C. & P. 538, A., thirty years ago, died seised of a cottage, having a son, B., and a daughter, C. At his death, C., his daughter, then unmarried, took possession of it, and afterwards married D.; and, after his death, W. After her death, W. remained in possession sixteen years :—Held, that the son of B., who was the heir of C., as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it.

# Advowson*.

See tits. *Quare Impedit—Simony.*

(1 *Peters. Abr.* 302.)

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GULLY *v.* THE BISHOP OF EXETER, T. T. 1827. C. P. 4 *Bing.* 290; S. C. 12 *Moore*, 290.

In a devise, an advowson in gross passes under the description of a *tenement*†.

A TESTATOR devised in a residuary clause as follows:—"All the rest and residue of my goods and chattels, lands and tenements, not before given and bequeathed, my debts being paid, I give and bequeath, subject and charged as aforesaid, to my brother Richard Stevings, if living at the time of my death; if not living to his

* An advowson is a right which a man has of nominating a proper person to fulfil the duties and to receive the profits of an ecclesiastical benefice. Anciently, the bishop had the sole cure of souls throughout his whole district, and received all the profits, which he and the clergy distributed into four parts: one to the bishop to maintain hospitality, and support the clergy residing with him; one for the building and repairing of churches; one for the poor, and one to support the inferior clergy, whom the bishop used to send to particular places as his deputies, and to remove or recal at his pleasure. As soon, however, as tithes were established as a law, that is, before or about the time of Charlemagne, it was usual for the bishop to allocate to his vicar or curate in any district the whole or part of the tithes or other profits arising there. When the feudal lords, for the sake of having Divine service performed in their districts, were willing to alienate part of their lands to the church, for the purpose of building churches where they were wanted, they were allowed in return to nominate a clergyman to the bishop, who, if he was qualified, was obliged to admit him. These grants being insufficient alone for the maintenance of a parson, were not made without the consent of the bishop to allocate, in aid of the glebe, the tithes of that precinct to the use of the parson, who now began to have a permanent interest for life in his parish.

This was the origin of presentative advowsons, in which, though a matter ecclesiastical, the lay patron was allowed to have a temporal and valuable interest, inasmuch as it might serve as a provision for one of his children, or any other relation that was qualified for it; and as, at the same time that these glebes were granted, most fiefs were hereditary, this right of advowson presentative descended to the heir.

*Advowsons in gross* are, when they exist as personal rights, independent of any corporeal hereditament. (*Hill* v. *Grange*, Plow. Rep. 170). Except in a few cases, an advowson in gross can never be appendant again. (See 1 H. Bl. 426; 1 Salk. 24; 2 Salk. 560; and Mirehouse, 15).

An *advowson donative* is when the King, or any subject by his license, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. Lord *Coke* says, that, if the patron of a donative doth once present to the ordinary, and his clerk is admitted and instituted, the church is by that means become presentative, and shall never after be donative. (See 1 Inst. 344; F. N. B. 42; 2 Bl. Com. 22, 25; Seld. on Tithes, c. 12, 391; Cro. Jac. 63; 3 Salk. 140; 3 Wils. 356).

An *advowson collative* is where the bishop and patron are one and the same person, in which case the bishop cannot present to himself, but he does by one act of collation, or conferring the benefice, the whole that is done in common cases by both presentation and institution. (See 2 Bl. Com. 22; 1 Inst. 344; 6 Co. Rep. 50 a; Hob. 242, 301; Mirehouse, 40).

† The words in a will: "I do give to my son R. the perpetual advowson of H. B. in L., and my manor of L., and all my lands in it," were held by three Judges, (*Park*, J., dissentiente), to give an estate for life in the advowson, although, at the period of making the devise, he was residuary legatee and incumbent of the living. (*Pocock* v. *Bishop of Lincoln*, 3 B. & B. 27; S. C. 6 B. Mo. 159). The testator, after devising all his manors, advowsons, &c., conveyed an advowson to trustees to present F. J., when vacant, and then in trust for himself and his heirs: —Held, that the devise of the advowson was revoked. (*Sparrow* v. *Hardcastle*, 1 Ken. 67; S. C. 3 Atk. 798; S. C. Amb. 224).

children, to be divided between them; but my mind is, that Catherine shall have 200*l.* Thomasine 300*l.*, and Elizabeth 200*l.* more than any of the rest." On this it was objected, that the above did not convey to the children of Richard Stevings a fee in the property of the advowson, and that an advowson in gross would not pass under the description of a tenement. The Judge who tried the cause, nonsuited the plaintiff; but gave him leave to move for a new trial. On motion for that purpose, after argument, the Court said—It has been admitted that an advowson appendant, lies in tenure, and will, therefore, pass under such a description. The authorities, however, do not make any distinction between advowsons in gross and those which are appendant. In Coke, it is said (12): "Tenement is a large word, to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits of sender out of lands, and the like, wherein a man hath any frank tenement, and whereof he is seised ut de libero tenemento." Tenementum, also, is the word used throughout the statute De Donis. All the older authorities on this subject are to be found in Viner's Abr., and from these it appears clear, that an advowson, as well in gross as appendant, does lie in tenure: the modern decisions are but few. The plain meaning of Lord Hardwicke, in the case of *Westfaling* v. *Westfaling*, is, that an advowson will pass under the description either of tenement or hereditament, for both cannot be necessary.

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EDWARDS *v.* BISHOP OF EXETER, T. T. 1839. C. P. 5 *Bing. N. S.* 652; S. C. 7 *Scott*, 652.

A Roman Catholic, who is a co-patron of an advowson, cannot join in the presentation.

ON a quare impedit, the declaration, after shewing by the deduction of title, that, at the time of the last avoidance the plaintiff and one W. K. were seised of the advowson as of fee and right in equal moieties, proceeded to allege that the church became vacant by the death of the last incumbent; by reason whereof, and because the said W. K., at the time when the said church so became vacant as aforesaid, was, and from thence continually has been, and still is, a person professing the Roman Catholic religion, it did and doth belong to the plaintiff to present a fit person to the said church on the vacancy; it then averred the disturbance of the plaintiff's right to present by the defendants. The defendants pleaded, that the said W. K. had not joined nor in any manner concurred in the said presentation; and that the bishop declared and assigned that to be his reason and ground for declining and refusing to accept the said presentation. On demurrer—

The Court were of opinion, that, when there are two tenants in common of an advowson, one of whom is incapacitated from presenting as a Roman Catholic, the right of presentation devolves upon the Protestant tenant; the statutes 3 Jac. 1, c. 5, 1 W. & M. c. 26, and 12 Anne, c. 14, not giving to either University the joint right of presentation in case of such disability on the part of one co-patron out of many.

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RENNELL *v.* BISHOP OF LINCOLN, T. T. 1827. K. B. 7 *B. & C.* 113; S. C. 9 *D. & R.* 810, *overruling decision in* 3 *Bing.* 223; S. C. 11 *Moore*, 139; S. P. MIREHOUSE *v.* RENNELL, E. T. 1832. C. P. 1 *M. & Scott*, 683; S. C. 8 *Bing.* 490.

Where a prebendary, having the advowson of a rectory in right of his prebend, dies whilst the church is vacant, his personal representatives have the right of presentation from that turn*.

WRIT of error from the Common Pleas.

This was a quare impedit, brought by the administratrix of the late prebendary of South Grantham, in the cathedral church of Salisbury, against the three defendants, to recover the presentation to the rectory of the parish church of Welby, in the county and diocese of Lincoln, the advowson of which belongs to the prebend of South Grantham, and which became vacant in the lifetime of the intestate the late prebendary.

The declaration stated the seisin of one Dr. Dodwell of the prebend to which the advowson belongs, in his demesne as of fee in right of the said prebend; his presentation of a clerk who was admitted, instituted, and inducted; the death of the prebendary, and the admission, institution, and induction of Robert Price to the prebend; the death of Price, and the admission, institution, and induction of the intestate; the death of the incumbent, whereby it belonged to the intestate to present; the death of the intestate pending the vacancy; and administration granted to the plaintiff, whereby she is entitled to present, but that the defendant hindered her.

The defendant the bishop pleaded the usual plea, that he claims nothing but as ordinary; and there is judgment against him, with a cesset executio in the usual form.

The other defendants plead, that, after the death of the intestate, and whilst the church continued vacant, one of them was duly admitted, instituted, and inducted to the prebend, whereby it belonged to him to present to the rectory; that he accordingly presented the other, whose admittance has been prevented by a writ of ne admittas, directed to the bishop. To this plea the plaintiff demurred generally.

*Best*, C. J., *Park*, J., and *Burroughs*, J., (dissentiente, *Gaselee*, J.,) held, that the right to present was in the prebendary, and not in the personal representatives of the deceased. But—

On writ of error, the judgment was reversed by *Bayley*, J., *Holroyd*, J., and *Littledale*, J.; Lord *Tenterden*, C. J., dissentiente.

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ALSTON *v.* ATLAY, T. T. 1837. Ex. Chamb. 2 *N. & P.* 492.

An incumbent who has the cure of souls below 8*l.* a year in the King's books, by institution to an-

A SPECIAL verdict stated, that the rectory of C. is a benefice under the value of 8*l.* in the King's Book. The plaintiff was instituted and inducted in 1816, and duly subscribed and read the articles. For many years after the plaintiff became rector of C., the defendant, who was a farmer there, regularly paid his tithes to the plaintiff, as the rector, and continued to do so down to Michael-

* An advowson descended to co-parceners, A., B., C., and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to presentation descended. E., however, presented, and, on the next avoidance, F. presented:—Held, that the presentations by E. and F. were to be counted, although they were usurpations on the right of F. and D. respectively; and that, on the seventh avoidance, F. would be again entitled to present. (*Richards* v. *Earl Macclesfield*, 7 Sim. 257).

other benefice vacates the former.

mas, 1832. That, in 1829, the plaintiff was instituted and inducted to the rectory of O., (distant 100 miles from C.), and subscribed and read the articles. O. is a benefice, with cure of souls, of higher value than 8*l.* in the King's Books.

After argument, the Judges were of opinion, that, if an incumbent with cure of souls below 8*l.* a year in the King's books be instituted to another benefice, the first living is absolutely void as to the patron, (although not so as to incur a lapse), and, being void, it is inalienable.

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BISHOP OF MEATH *v.* MARQUIS OF WINCHESTER, T. T. 1836. Dom. Proc. 3 *Scott*, 561; S. C. 3 *Bing. N. S.* 183.

The 10 Hen. 7, did not pass advowsons to the King, but the King takes them de jure privato.

IN quare impedit, it appeared, that, by letters patent, dated at Drogheda, the 5th January, in the 9th year of his reign, King Edward 4 granted to William Sherwood Bishop of Meath, and his successors, the advowson as well of the rectory as of the vicarage of the parish church of Rathweir, county of Meath. By an act passed in a parliament held at Drogheda, in the 10 Hen. 7, it was enacted, that there be resumed, seised, and taken into the King our sovereign lord's hands all manors, lordships, &c., advowsons of churches or chapels &c. and all other manner of profits, hereditaments, and commodities whereof our said sovereign lord, or any of his noble progenitors, Kings of England, was at any time seised in fee-simple or fee tail, from the last day of the reign of King Edward 2. to this present act.

It was contended, first, That the statute revoked no grants made by any Kings except those who were the progenitors of Hen. 7, in the strict sense of that word; and that Edward 4 was not a progenitor of that King; secondly, That the statute did not extend to grants of which such progenitors were seised jure privato only, and that Edward 4 was seised jure privato of the advowson in question; thirdly, That it did not extend to revoke grants to corporations, whether sole or aggregate; and, lastly, that it did not extend to any grants but those under the great seal, either of England or Ireland, and that the grant of the advowson in question was made under neither.

The Court held, that this grant fell within the operation of the statute Henry 7 and was avoided thereby.

By 3 & 4 Will. 4, no advowson to be recovered, but within three incumbencies or sixty years *.

By 3 & 4 Will. 4, c. 27, s. 30, it is enacted, That, after the said 31st day of December, 1833, no person shall bring any quare impedit, or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; that is to say, the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies shall amount to the full period of

* By stat. 1 Mary, sess. 2, c. 5, (which was extended to Ireland by stat. 10 Car. 1, st. 2, c. 6), it was enacted, That the stat. 32 Hen. 8, c. 2, should not extend to a writ of right of advowson, quare impedit, assize of darrein presentment, nor jure patronatus, but the time of seisin to be alleged should be as it was at the common law before the making of the said stat., which was from the time of the commencement of the reign of Richard I. Before the stat. of Mary,

sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

## Affidavit, generally*.

(1 *Peters. Ab.* 35.)

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VI. WHEN THEY MAY BE USED, AND WITHIN WHAT TIME TO BE SWORN, p. 126.

VII. WHEN THEY MAY BE USED A SECOND TIME IN SAME CAUSE, OR FOR A DIFFERENT PURPOSE, p. 127.

VIII. WHEN TO BE FILED AND COPIES OBTAINED, AND WHEN THE LATTER MAY BE UESD, p. 128.

IX. OF ILLEGIBLE WRITING, ERASURES, AND ALTERATIONS, p. 130.

X. OF DEFECTS IN, AND WAIVER OF THEM, p. 131.

XI. OF AMENDING AFFIDAVITS, p. 131.

XII. OF INTRODUCING IMPERTINENT, AND IRRELEVANT MATTER, p. 133.

XIII. OF JUSTICES RECEIVING VOLUNTARY AFFIDAVITS, p. 133.

if the incumbent of an advowson had lived sixty years and died, and a stranger had presented, the patron could not maintain quare impedit or darrein presentment. (See Plowd. 371 b; Co. Litt. 115. a.) By the stat. 7 Anne, c. 18, (which was held not to be retrospective, 5 Ves. 828), it was enacted, that no usurpation should displace the estate of the patron; and that he might present on the next avoidance, as if there had not been any usurpation; which provision, in effect, took away all limitations of suits about the right of patronage. (See 2 Bl. Com. 250).

* Under this title, the cases comprising general rules only are abridged. The decisions connected with particular matters are placed under their appropriate alphabetical divisions. An affidavit is a written declaration, attested, as to its truth, by the oath of the party making it. It is the medium of proof through

## I. BY WHOM TO BE MADE*.

## II. GENERAL REQUISITES AND QUALITIES.

OLIVER *v.* PRICE, M. T. 1834. Ex. 3 *D. P. C.* 261.

Every affidavit must purport on the face of it to be on oath.

MOTION on an affidavit "maketh and saith," omitting word "oath."—*Rule refused.*

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REG. *v.* MANCHESTER RAILWAY COMPANY, T. T. 1838. Q. B. 3 *N. & P.* 439.

It must contain distinct and positive allegations, not suggestions merely;

IN an affidavit in support of a motion for a certiorari to remove an inquisition to assess compensation for lands taken under a Railway Act, the inquisition was not set out, nor the omission accounted for, and only stated that the deponent objected that it did not contain the requisite notice to treat, and no matter of fact distinctly alleged from which a question of law might arise.

The Court held the affidavit insufficient, merely containing suggestions, and no positive and distinct allegations of the circumstances.

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WILLIS *v.* JAMES, M. T. 1832. K. B. 1 *D. P. C.* 498.

and state the material facts and dates with accuracy and precision†;

AFFIDAVIT to enter up judgment on an old warrant of attorney, alleged that the deponent believed that the defendant is alive, for he saw him "about" six days since.—*Rule granted.*

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CLASSEY *v.* DRAYTON, H. T. 1840. Ex. 6 *M. & W.* 17.

and, in moving to set aside proceedings, must distinctly shew that the step objected to has been taken,

APPLICATION to set aside judgment signed for irregularity. It was objected, that the affidavit did not shew that any judgment had been signed, but only that a rule to compute had been obtained, which was not equivalent to a distinct statement.—*Rule discharged.*

which all contested matters, in summary applications to the superior courts of common law, are established or negatived. The criterion, as to whether it be or be not sufficient, is, whether the statements contained in it are such as that an indictment for perjury could be sustained, if they be ascertained to be untrue. (*Watson* v. *Walker*, 1 M. & Scott, 437).

* An affidavit may be made by any person without reference to his religion, station, or country; (1 Phil. Ev. 19, 3rd ed.); provided he have the use of his reason, and such religious belief as to feel the obligation of an oath. The other numerous disqualifications which might be urged against the party if he were admitted as a witness in a cause, do not, in strictness, render him incompetent to depose to facts to the Court necessary to be proved on motions, or founded on written depositions. The deponent, however, must not be a person who has been convicted of an infamous crime, (2 Salk. 461), unless the affidavit be produced as a means of exculpating himself. (7 Mod. 413; 2 Salk. 461). To successfully object to the affidavit, from incompetency in the deponent, the judgment, as well as the conviction, must be proved by the production of the record. (*Holmes* v. *Grant*, 1 Gale, 59; *Cook* v. *Maxwell*, 2 Stark. 183).

† And in the case of service of a rule, must state "rule annexed;" and "rule in this cause," is insufficient. (*Fidlett* v. *Bolton*, M. T. 1835, K. B., 4 D. P. C. 282), but the word "true," without saying "copy," suffices. (*Kerr* v. *The Sheriff of Stafford*, M. T. 1836, B. C., 5 D. P. C. 238).

A party who swears to representations made to him by others, must swear he believes them to be true. (*Preedy* v. *Lovell*, Ex. 1 Tyrw. & G. 847).

HOWORTH *v.* HUBBERSTY, H. T. 1835. Ex. 3 *D. P. C.* 455.

THE affidavit, on which a rule had been granted was—This deponent "said," instead of "saith."—*Rule discharged without costs.*

and be averred to be true in the present, not the past tense.

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SHIRLEY *v.* JACOBS, M. T. 1834. C. P. 1 *Scott*, 67, *n.*

ON an objection to an affidavit on which a rule was obtained, because it merely professed to state the substance of the Lord Chief Justice's order, whereas the order should have been set forth, or at least an office copy should have been annexed to the affidavit, the Court held, that it was enough to state the substance of the order.

An affidavit to rescind a Judge's order need not literally set forth the order.

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## III. WHEN IN A FOREIGN LANGUAGE.

*Re* EADY, E. T. 1838. C. P. 6 *D. P. C.* 614.

ON an application being made, under the 3 & 4 Will. 4, c. 74, it was holden to be no objection to an affidavit sworn before a native Court, that it was originally in the German language, if it be translated and the translation verified; and the oath may be administered in the German language, if it be translated by an interpreter to the deponent; and it is sufficient that the affidavit should be signed by the Judge of the country, and the deponent's signature need not be attached; the Judge's signature being verified, and an affidavit being produced, that such is the course of practice in Germany.

An affidavit in a foreign language translated, and the translation verified, and the oath administered in a foreign language, is sufficient*. It need not be signed, if such be the practice of the country where made.

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## IV. OF THE FORMAL PARTS OF.

### (*a*) TITLE OF THE AFFIDAVIT.

#### 1. *With respect to the Court*†.

REG. GEN. H. T. 2 *Will.* 4.

AN affidavit, sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such Judge belongs, though not intitled of that Court; but not in any other Court, unless intitled of the Court in which it is to be used.

*See Post* "*Before whom Sworn*"—"*Jurat;*" *and see* 1 *Chit. Rep.* 165; 13 *East*, 189; 1 *B. & C.* 271; 3 *D. P. C.* 17.

An affidavit not intitled of any Court, if sworn before a Judge, to be received in the Court to which he belongs, but not elsewhere.

* And an affidavit signed by the deponent in a foreign character, although illegible, may be received, without an affidavit stating that the party was a foreigner. (*Nathan* v. *Cohen*, H. T. 1835, B. C., 3 D. P. C. 370).

† All affidavits, to be strictly regular should be intitled in the Court in which they are to be used; (*Osborn* v. *Tatum*, 1 B. & P. 271); but when sworn before a commissioner of the Court, (*Urquhart* v. *Dick*, M. T. 1834, 3 D. P. C. 17), or there be any statement in the affidavit from which an inference can be fairly adduced that it was intended to be used in the Court in which it is proposed to be made available, that will suffice. (*R.* v. *Hare*, 13 East, 189). Hence, where an affidavit was sworn before the filacer, and used in the Court of which the filacer was an officer, it was esteemed sufficient, although not intitled of the Court. (*Bland* v. *Drake*, 1 Chit. Rep. 165; S. C. *Molling* v. *Poland*, 3 M. & S. 157, *Osborn* v. *Tatum*, 1 B. & P. 271). In the former case there was no title, and the words "by the Court" were only written in the jurat.

ROLFE *v.* BURKE, H. T. 1827. C. P. 4 *Bing.* 101; S. C. 12 *Moore*, 298.

Affidavit intitled in "the Common Place," instead of "Pleas," admissible.

AFFIDAVIT to set aside proceedings on bail-bond was intitled "In the Common Place." On this being objected to, the Court overruled the objection, observing that the ancient style of the Court was in communi loco, and it was afterwards, and now is, frequently termed the Court of Common Bench.

*See* 1 *B. & P.* 271.

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WHITE *v.* IRVING, M. T. 1836. Ex. 5 *D. P. C.* 289.

And when sworn before a commissioner describing himself as a commissioner of the Exchequer and Common Pleas in England, it may be used in either Court, though not intitled as of any.

AN affidavit was sworn in Ireland, before a commissioner who described himself in the jurat as a commissioner of the Courts of Exchequer and Common Pleas in England. It was objected, that, as the affidavit was not intitled as of any Court, it was not admissible; but the Court held it might be used in either of the Courts.

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PERRIN *v.* WEST, T. T. 1835. K. B. 5 *N. & M.* 291; S. C. 1 *Har. & W.* 401.

On the removal of a prisoner by habeas corpus into the Queen's Bench, the affidavits are properly intitled in that Court.

A PRISONER, in the custody of the sheriff, under process from an inferior Court, was removed out of the custody of the Marshal by a writ of habeas corpus cum causa. Affidavits intitled in the Queen's Bench were holden by that Court to be properly intitled, although it was objected, that, as the habeas was directed to the sheriff, and not to the Judge of the inferior Court, the body alone was removed, and not the cause.

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*Re* BATES, E. T. 1837. C. P. 4 *Scott*, 396.

Under the Interpleader Act it has been held not material, though the affidavit should be intitled as of any Court.

IT was objected, on application under 3 & 4 Will. 4, c. 74, s. 91, that the affidavits were not intitled of the Court, but it was holden, that, as such motions could only be made in the Common Pleas, it was not essentially necessary that the affidavits should be intitled of that Court.

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MANNERS, *In Re.* T. T. 1839. Ex. 5 *M. & W.* 278.

Where an inquisition has been returned into the office of the Queen's Remembrancer, the affidavits should be intitled accordingly.

INQUISITIONS in outlawry had been returned into the office of the Queen's Remembrancer. On a rule to shew cause why the parties should not be at liberty to traverse the inquisition, or why it should not be quashed, (the affidavits in support of the rules were intitled "In the Exchequer of Pleas," and the counsel received their instructions from attornies of this Court,) it was objected, that the affidavits ought to have been intitled "in the office of the Queen's Remembrancer of the Court of Exchequer." The Court held the objection a valid one.

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*2. With respect to the Cause and the Parties.*

REGORY, *Ex parte*, T. T. 1828. K. B. 8 *B. & C.* 409—S. P. DAVIS *v.* STANBURY, 3 *D. P. C.* 440.

If there be no cause pending, it suffices to intitle the affi-

ON motion to enter up judgment on a warrant of attorney—

The affidavit on which the motion was founded was intitled "In the King's Bench," but not in any cause.

*Per Curiam.*—As there is not, in fact, any cause in court, the title of the affidavit is sufficient*. davit in the Court†.

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BORTHWICK *v.* RAVENSCROFT, E. T. 1839. Ex. 5 *M. & W.* 31; S. C. 7 *D. P. C.* 393.

THE defendant, whose real name was H. D. R., was described in the process as H. R.; and the affidavit, on application to set aside a distringas, was intitled as in a cause against H. D. R., sued as H. R. The Court held it incorrect; there being until appearance no such cause as that described in the affidavit. When defendant is misnamed there is no cause in Court in the right name before appearance.

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SHRIMPTON *v.* CARTER, E. T. 1835. Ex. 3 *D. P. C.* 648.

AFFIDAVIT, intitled "G. S. *v.* W. C., the Elder; *sued* as W. C." The cause being "G. S. *v.* W. C.," was rejected by *Alderson*, B. The title as to the cause must strictly correspond with the title of cause.

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SHAW *v.* ROBINSON, T. T. 1826. K. B. 8 *D. & R.* 423—S. P. MASTERS *v.* CARTER, H. T. 1836. K. B. 4 *D. P. C.* 577.

THIS was an application to discharge bail, on the ground of the arrest of the principal having been by the initial only of the defendant's Christian name. And the Court held, that an affidavit intitled in a cause, using the same initials, could not be used: the cause should have been described in the affidavit as it was contended the party should have been described in the writ. The affidavit should state the Christian and surname of the parties at length‡;

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HILBERT *v.* WILKINS, M. T. 1839. B. C. 8 *D. P. C.* 139—S. P. MORLEY *v.* CUNNINGHAM, M. T. 1839. B. C. 8 *D. P. C.* 139.

ON motion for rule to compute, the affidavit described the defendant with the initial letters of his Christian name. *Littledale*, J., held it necessary that affidavit should be produced that he had so signed the bill. unless the initials are used in an action on a bill of exchange, when it must be shewn that the bill was so signed.

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DOE *d.* COUSINS *v.* ROE, M. T. 1838. Ex. 7 *D. P. C.* 53.

IN support of a motion against the casual ejector, the affidavit was intitled, "Doe *dem.* Cousins *v.* Roe." The declaration was on In ejectment on *several* de-

* It would be no objection, that such affidavits were so intitled, as a warrant of attorney is of itself an admission that there is a cause in court; (*Sowerby* v. *Woodroff*, 1 B. & A. 567).

† And if intitled as in a cause, they cannot be read; and therefore, if the matter to which the application relates is pending in another court, as in a motion for a certiorari; (*Ex parte Nohro*, 1 B. & C. 267); or where no cause is as yet pending, as in applications for writs of mandamus, qûo warranto, criminal informations; (*Rex* v. *Robinson*, 6 T. R. 642); or shewing cause against them, (*Rex* v. *Harrison*, Id. 60). The affidavit should not be intitled in a cause, but merely in the court; nor should they be intitled in moving for an attachment for the nonperformance of an award for setting aside an award when there is no cause in fact. (*Bevan* v. *Bevan*, 3 T. R. 60; *Bainbridge* v. *Houlton*, 5 East, 21).

‡ Saying "A. B. and others," is bad; all parties should be named, (*Williams*, J.—*Tomkins* v. *Geach*, H. T. 1837; 5 D. P. C. 509), describe them as plaintiff and defendant. (*Harris* v. *Griffith*, M. T. 1835, B. C., 4 D. P. C. 289).

An affidavit in support of a rule under 1 Geo. 4, c. 87, must be intitled with the Christian and surnames of the lessors of the plaintiff set out at length. (*Patteson*, J.—*Doe* d. *Pryme* v. *Roe*, H. T. 1840, B. C., 8 D. P. C. 340. See 2 Moore, 722; 7 D. P. C. 53).

mises they must each be stated;

several demises. It was submitted, that the affidavit was sufficient, as the plaintiff was John Doe, and the lessors were no parties to the action.

*Sed Per Cur.*—It is a misdescription of the action. It ought to have been, "Doe on the several demises of A., B., and C.," according to the fact.

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RICHARD *v.* ISAAC, T. T. 1834. Ex. 1 *C., M., & R.* 136; S. C. 2 *D. P. C.* 710.

and describe the cause as A. B. against C. D., not "at suit of" &c.;

AFFIDAVIT for judgment as in case of a nonsuit. Rejected by *Gurney*, B., because intitled "Thomas David Isaac, at the suit of John Richard," instead of "A. B. *v.* C. D."

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WRIGHT *v.* HUNT, T. T. 1832. K. B. 1 *D. P. C.* 457—S. P. ENGLER *v.* TWYSDEN, T. T. 1838. C. P. 6 *Scott*, 581.

and state the special or representative character in which the plaintiff proceeds;

THE plaintiff sued as assignee of A. B. The affidavit was intitled merely "A. B. *v.* C. D.;" and was rejected by *Pattesson*, J.

*See* 5 *East*, 150; 1 *D. P. C.* 97.

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CASLEY *v.* SMYTH, M. T. 1835. Ex. 1 *Tyrw. & G.* 219; S. C. 4 *D. P. C.* 477—S. P. PHILLIPS *v.* HUTCHINSON, M. T. 1834. 3 *D. P. C.* 20.

and of whom he is the representative;

THIS was an application to set aside judgment on bail-bond: the affidavit on which it had been moved was intitled, "J. C., assignee," &c.—*Rule discharged, with costs.*

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CLARK *v.* MARTIN, M. T. 1834. Ex. 3 *D. P. C.* 222—S. P. ENGLER *v.* TWYSDEN, T. T. 1838. C. P. 6 *Scott*, 580.

describing him as "executor," &c., without saying of whom, is bad.

MOTION for judgment as in case of a nonsuit. It was objected, that the affidavit on which the rule had been obtained was "W. N. C. *v.* G. M., executor," &c., not stating of whom: the Court seemed inclined to give effect to the objection, but the plaintiff agreed to give a peremptory undertaking.—*Rule discharged accordingly.*

---

MILLER *v.* MILLER, T. T. 1835. C. P. 2 *Scott*, 117.

The addition of "widow" in title of a cause is not necessary.

ON a writ of right, it was objected, that the tenant was not properly described in the affidavit, her addition of "widow," being omitted.

*Sed Per Cur.*—The addition of widow can no more be necessary than those of spinster, bachelor, merchant, &c.

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REEVES *v.* CRISP. K. B. 6 *M. & S.* 274.

And describing the party as "gentleman," &c., when he is not an attorney will not vitiate the affidavit.

The affidavit was intitled, "Reeves, gentleman," &c., the party not being an attorney:—Held, sufficient: those words, not appearing to have misled the plaintiff, might be rejected.

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CORRY *v.* WHARTON, H. T. 1835. C. P. 2 *Scott*, 436—S. P. PITT *v.* EVANS, M. T. 1833. Ex. 2 *D. P. C.* 226.

When affidavit used in two

IT was objected, that the affidavits upon which the application was founded were intitled in one action instead of two; and the case

of *Owen* v. *Hurd* was referred to, where Lord *Kenyon* said, "he remembered an instance where, there being no title to the affidavits in the cause, the Court said they could not take any notice of them, even though the counsel on the other side did not wish to take the objection."

The Court ordered the affidavits to be properly intitled and resworn, being intitled in the two causes, and that being the same parties, made no difference.

causes, must be intitled in both, though the parties are the same.

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POCOCK *v.* COCKERTON, M. T. 1838. Ex. 7 *D. P. C.* 21.

ON motion to set aside proceedings against bail, it was objected, that the affidavit on which the rule was obtained was improperly intitled. It might be intitled either in the original action or in that against the bail, but not, as here, in both actions. But the Court overruled the objection.

To set aside proceedings against bail, it may be intitled in both actions.

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PERRIN *v.* WEST, T. T. 1835. K. B. 5 *N. & M.* 291; S. C. 3 *Ad. & E.* 405.

A SUIT was commenced in an inferior Court: the defendant sued out a habeas corpus cum causa. A rule had been obtained, on affidavits, intitled "In the King's Bench," calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Marshal of the Marshalsea, as to this action. This rule was enlarged on an affidavit, likewise intitled "In the King's Bench." It was objected, that the affidavits should not have been intitled "In the King's Bench," as, in fact, the cause in which they were so intitled was not in Court.

*Sed per Cur.*—The affidavit is properly intitled. As the defendant is removed by the habeas corpus cum causa, the plaintiff may proceed without recommencement of the suit; and therefore, for some purposes, the cause is in Court.

After a party has been removed out of custody on a civil process, by habeas corpus, into the King's Bench, the affidavit may be intitled in the cause*.

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THORPE *v.* HOOK, M. T. 1832. K. B. 1 *D. P. C.* 494—S. P. FINCH *v.* COCKER, H. T. 1834. Ex. 2 *C., M., & R.* 412.

THIS was an application to set aside a ca. sa., on ground of misnomer. The judgment was for the defendant as James Hooks; the ca. sa. described him as John. The affidavit was intitled in the latter name, instead of being intitled in the correct one, according to the judgment, stating A. B. sued by the name of &c.—*Rule discharged.*

*See Borthwick* v. *Ravenscroft*, 7 *D. P. C.* 393.

Where a party has been misnamed, the affidavit should be intitled A. B., sued by the name of &c†.

* On motion to deliver up a warrant of attorney, the affidavit may be intitled as in a cause. (*Williams*, J.—*Thompson* v. *Vaux*, T. T. 1837, B. C., 5 D. P. C. 691. *See* 1 B. & A. 568; *Perrin* v. *West*, 5 N. & M. 291). So, on an application against an attorney, to compel him to deliver up papers, it may be intitled in the cause out of which the transaction arose, although judgment has been obtained, and execution issued. (*Patteson*, J.—*Simes* v. *Gibbs*, H. T. 1838, B. C., 6 D. P. C. 310); and the affidavit of the execution of a power of attorney, to demand the performance of a bond, must be intitled in the cause. (*Coleridge*, J.—*Doe* d. *Clarke* v. *Stillwell*, H. T. 1838, B. C., 6 D. P. C. 305.

† And where a cause has been tried and execution issued by the initial of the defendant's Christian name, "W.," an affidavit, in support of an application against the sheriff for not returning the fi. fa., cannot be intitled in the Christian name, "William." (*Williams*, J.—*Reg.* v. *Sheriff of Surrey*, E. T. 1840, B. C., 8 D. P. C. 510.

GANDELL *v.* ROGIER, M. T. 1825. K. B. 4 *B. & C.* 862; S. C. 7 *D. & R.* 259.

In moving to set aside proceedings in error, the affidavit must be intitled in the cause in *error*, and not in the original.

ON a motion made in a cause, removed into King's Bench by writ of error, an objection was taken to the affidavit on which the rule was obtained; viz. that it was intitled in the original action.

And *Per Cur.*—The objection must prevail. The affidavit should be intitled in the cause in error, and not in the original cause.

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WATSON *v.* WALKER, E. T. 1832. C. P. 1 *M. & Scott*, 437; S. C. 8 *Bing.* 315.

So, on a writ of false judgment from an inferior Court, the affidavit should be intitled in the cause in error.

AN affidavit, in support of a rule to set aside a writ of false judgment from an inferior Court, was intitled in the name of the parties in the Court below. On the affidavit being objected to, the Court said, where a motion is made in a cause removed by writ of error to a superior Court, the affidavit must be intitled in the cause in error, and not in the original cause. There is, in fact, no such cause in this Court as that mentioned in the affidavit; consequently, perjury could not be assigned upon it. That is a defect that cannot be cured.

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REX *v.* SHERIFF OF MIDDLESEX, E. T. 1826. K. B. 5 *B. & C.* 389; S. C. 8 *D. & R.* 149.

On motion against the sheriff for a contempt, it is preferable, in addition to intitling the affidavit in the cause against him, to add the title of the cause out of which the contempt grew.

ON motion te set aside an attachment against the sheriff for contempt, it was objected, that the affidavit upon which the motion was made was intitled "The King *v.* The Sheriff of Middlesex," but, without adding the cause between the parties, which it was the regular practice to do. The Court ordered the rule to stand over, and directed search and inquiry to be made in the Crown-office, as to the practice, and as to any rule of Court, if there was any. The case, accordingly, stood over; when the Court said, that the practice appeared, generally, to have been, to add the cause between the parties, but this had not been the case universally. It was most convenient and proper to add the title of the cause between the parties. But as, at present, there was no rule of Court upon the subject, they thought, upon principle, that it was not absolutely necessary.

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VINER *v.* LANGTON, E. T. 1836. Ex. 5 *D. P. C.* 92.

An objection to the title of an affidavit must be entered into before the matter to which it relates is substantially decided.

AFTER the principal question had been decided, it became necessary to ascertain whether the plaintiff had lost a trial. Inquiry was directed to be made. During the interval, it was suggested that the affidavit was not correctly intitled, but—Held, too late.

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### (*b*) OF DESCRIBING THE DEPONENT, HIS PLACE OF ABODE*, AND ADDITION.

REG. GEN. H. T., 2 *Will.* 4.

The addition of every deponent must be stated in the affidavit.

THE addition of every person making an affidavit shall be inserted therein.

* The names of the deponent or deponents must, in every instance, be stated fully, and not by initials, or any contraction of the first or other names; or if the

LAWSON *v.* CASE, M. T. 1833. EX. 1 *C. & M.* 481; S. C. 2 *D. P. C.* 40.

THIS was a motion to set aside a writ for irregularity. The affidavit only described the deponent as "the above-named deponent," without other addition:—Held, insufficient.

Describing him as "above-named defendant," without further statement, was, at one time, held insufficient;

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LAWSON *v.* CASE, E. T. 1833. EX. 2 *D. P. C.* 41; S. C. 1 *C. & M.* 481—S. P. BROOKS *v.* FARLAR, M. T. 1836. C. P. 3 *Scott*, 654; S. C. 5 *D. P. C.* 361.

A RULE had been obtained to set aside proceedings for irregularity; it was objected, that r. 5, H. T., 2 Will. 4, had not been complied with; and, after hearing *Poole and Pembrey* (1 Tyrw. 387; S. C. 1 D. P. C. 693) quoted, the Court held, that the object of the rule was uniformity, and the words general, and as applicable to a party to the suit as any other person.

and that the deponent being a party in the cause ought to make no difference as to the additions;

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JACKSON *v.* CHARD, H. T. 1834. B. C. 2 *D. P. C.* 469—S. P. POOLE *v.* PEMBREY, H. T. 1833. EX. 1 *D. P. C.* 693—LAWSON *v.* CASE, E. T. 1833. EX. 2 *D. P. C.* 40.

ON its being objected, that the affidavit *of the defendant*, on which the rule had been obtained, did not contain his additions, the Court said the rule H. T. 2 Will. 4, did not apply to affidavits made by the defendants in the cause.

*See* 1 *Tyrw.* 387.

though the rule seems now to be otherwise*;

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ANGEL *v.* IHLER, E. T. 1839. EX. 5 *M. & W.* 163—S. P. SHARP JOHNSTON, M. T. 1835. C. P. 2 *Bing. N. S.* 246.

AN affidavit described the party as R. J., late of W., victualler, but now of &c. The Court held, that it was sufficient, without adding to the second description of place of abode, the party's occupation; and that, in fact, an affidavit made by the plaintiff or defendant required no further addition than plaintiff or defendant.

and these decisions have been since confirmed.

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MILLER *v.* MILLER, T. T. 1835. C. P. 2 *Scott*, 117.

ON a writ of right, the defendant, in the affidavit, was described as of "Lawrence Pountney, in the city of London," without describing the place as vill, parish, place, street, or lane, &c.

"Lawrence Pountney, in the city of London,"

true place of abode is not stated, it will vitiate the affidavit. (R. M. 15 Car. 2). Hence, in *Collins* v. *Goodyer*, 4 D. & R. 44; 2 B. & C. 563, where the deponent was described, in an affidavit of debt, as of "Dorset-place Clapham-road, Middlesex," his true residence being, "Dorset-place, Clapham-road, Surrey," it was held to invalidate the affidavit.

* The rule of H. T., 2 Will. 4, is not in fact a new rule, but a new application of the old rule of the King's Bench, M. T., 15 Car. 2, to the other Courts; and the words of both rules are as general as possible, "every person making an affidavit." In *Anon.*, (6 Taunt. 73), it was held, in the Common Pleas, that an affidavit in support of a motion made in the course of a cause, which stated the abode of the defendant, and styled him defendant, was sufficient, though it did not contain the addition of his degree; and the Court then observed, that there was no rule in that Court, as there was in the King's Bench, specially requiring the addition of deponents; and they held, that an affidavit made by a defendant in the cause was sufficient, if it stated his place of abode, and referred to his quality of defendant. The cases upon the subject of additions in affidavits are *Jarrett* v. *Dillon*, 1 East, 18; *D'Argent* v. *Vivant*, Id. 330; *Haslope* v. *Thorne*, 1 M. & S. 103; *Smith* v. *Younger*, 3 B. & P. 550; *Vaissier* v. *Alderson*, 3 M. & S. 165.

sufficient description of residence *;

But the Court held, that the deponent's place of abode sufficiently appeared.

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SHARPE *v.* JOHNSON, M. T. 1835. C. P. 4 *D. P. C.* 324; S. C. 2 *Bing. N. S.* 246; S. C. 2 *Scott,* 405.

and a prisoner in custody of Warden of Fleet need not state his place of abode †;

THIS was a motion to discharge the defendant out of the custody of the Warden of the Fleet for a defect in the affidavit of debt; it was objected, that the defendant had not stated his place of abode: but the Court held, that the rule H. T. 2 Will. 4, did not apply to a prisoner, who is in effect on the floor of the Court.

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DANIELS *v.* MAY, E. T. 1836. Ex. 1 *Tyrw. & G.* 834; S. C. 5 *D. P. C.* 83.

but merely saying "clerk to deponent's attorney," without more ‡;

AFFIDAVIT was "A. B., clerk to C. D., the deponent's attorney, maketh oath and saith," &c. The Court rejected the affidavit.

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GRAVES *v.* BROWNING, E. T. 1837. K. B. 6 *Ad. & E.* 805.

or describing deponent as "acting as managing clerk to Messrs. ——, attornies," not stating their place of business, bad.

AN affidavit, describing the deponent as acting as managing clerk to Messrs. A., B., & C., of &c., gentlemen, attornies for C. G., at present residing &c., maketh oath &c.

It was objected, that, if the deponent stated himself to be clerk to the attornies, it might be sufficient; but he says only that he acts as managing clerk. This does not satisfy the rule H. T. 2 Will. 4, r. 5, which requires the addition of every person making affidavit to be inserted.

*Per Cur.*—Lord *Denman,* C. J.—The deponent might be acting merely for the particular occasion.

It is not the usual form. If he called himself managing clerk, it would have done; it is not sufficient; but where the description of the residence of the employer is full and complete, and his clerk joins him in an affidavit, it is sufficient to describe him as clerk, without proceeding to give his own residence.

*See Bottomley* v. *Belchamber, Williams, J., T. T.* 1835; 4 *D. P. C.* 26—*S. P. Storcke* v. *Blanchard, M. T.* 1836. *B. C.* 5 *D. P. C.* 210.

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REX *v.* CARNARVON (JUSTICES), T. T. 1835. K. B. 5 *N. & M.* 364.

The want of an addition as to one of several deponents, it has been held, vitiates the whole §.

A JOINT and several affidavit was objected to, as being irregular, for want of the addition of one of the deponents. The Court refused to allow it to be used as to the statement of facts made by the other deponents.

* So is Kennington in the county of Surrey. (*Wilson* v. *Chambers,* 1 Har. & W. 116).

† Nor if in custody of the sheriff. (*Jervis* v. *Jones,* H. T. 1836, B. C., 4 D. P. C. 610).

‡ But describing deponent as "assessor" will not suffice. (*Nathan* v. *Cohen,* H. T. 1835, B. C., 3 D. P. C. 370; though stating "*late clerk* to" &c. is sufficient, although it was objected that it was not necessarily his present addition. (*Simpson* v. *Drummond,* H. T. 1834, B. C., 2 D. P. C. 473).

§ But where, to an affidavit by two deponents, the addition of one was defective, and it was urged, on the authority of *Rex* v. *The Justices of Carnarvon,* supra, that it was unavailable altogether, *Coleridge,* J., allowed it to be used so far as

(*c*) Of the jurat.

The King *v.* Cockshaw, M. T. 1833. K. B. 2 *N. & M.* 378; S.P. Rex *v.* Burn, T. T. 1837. K.B. 7 *Ad. & E.* 190; S.C. 2 *N. & P.* 152; S. C. 6 *D. P. C.* 36.

When sworn before a commissioner, the county should be stated in the jurat*;

Motion for a criminal information refused, because the affidavit was sworn before a commissioner, without the county or place being mentioned in the jurat.

*See R.* v. *Justices of West Riding of Yorkshire*, 3 *M. & Scott.* 493.

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Grant *v.* Fry, H. T. 1840. Ex. 8 *D. P. C.* 234.

but on an omission to state the county in the jurat, may be aided by reference to the body of the affidavit.

The jurat of an affidavit stated it to have been sworn at C. aforesaid. The deponent was described as of C., in the county of G.:—Held sufficient.

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Houlden *v.* Fasson, M. T. 1829. C. P. 6 *Bing.* 236; S. C. 3 *M. & P.* 559.

Where affidavit is made by several, the names of all the deponents should appear on the jurat.

In this case it was objected, that an affidavit, upon which the rule had been obtained, could not be received, the jurat being defective.

There were two deponents, and the jurat was thus sworn by both deponents: "At my house," &c. It was contended, that the several deponents should have been named in the jurat, according to the rule in the Court of King's Bench, adopted by practice in this Court‡.

The secondary stated, that there was no rule on the subject in this Court, but the practice was in accordance with the rule in the King's Bench. The Court said, that, as their officer had reported the practice of this Court to be the same as in the King's Bench, viz. to require the names of the several deponents to be mentioned in the jurat, the rule obtained on the defective affidavit must be discharged, but in this instance without costs.

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Daley *v.* D'Arcy Mahon, M. T. 1837. C. P. 6 *D. P. C.* 192.

If the jurat shews authority of commissioner, though not with technical correctness, it suffices †.

Jurat stated affidavit to have been sworn before a commissioner in Ireland, by virtue of a commission sent forth from the Court of Common Pleas:—Held, that the meaning was plain, and the objection not tenable.

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Rex *v.* Sheriff of Middlesex, H. T. 1836. Ex. 4 *D. P. C.* 765; S. P. Haynes *v.* Powell, E. T. 1835. B. C. 3 *D. P. C.* 599.

When sworn to be an illiterate deponent, it must appear to

Jurat was "Sworn by the above-named W. A.," &c. John Pullen, gentleman, having been first sworn that he had read over and explained the affidavit to the said W. A., and that he, W. A., un-

related to the statements made by the co-deponent, observing, that the case quoted must have proceeded upon the peculiar facts. (*Ex parte Edmonds*, T. T. 1837, B. C., 5 D. P. C. 702).

* And the day when the oath was administered. (3 Moore's Rep. 236).

† As proof of his acting as such is sufficient. (*Rex* v. *Howard*, T. T. 1832, N. P., R. & M. 12, 187).

have been read over to him and explained by the officer*.

derstood it, the Court held it not sufficient, as the officer himself ought to have read it over and explained it.

## V. BEFORE WHOM TO BE TAKEN†.

REG. GEN., H. T. 2 *Will.* 4.

Affidavits sworn before a Judge receivable in his own Court, though not intitled; but not in others, unless intitled of that Court.

AN affidavit, sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be sworn to in the Court to which he belongs, though not intitled of that Court; but not in any other Court, unless intitled of the Court in which it is to be received.

REG. GEN., H. T. 2 *Will.* 4.

Affidavits not to be sworn before parties' attorney or agent;

WHERE an agent in town, or any attorney in the country, is the attorney on the record, an affidavit, sworn before the attorney in the country, shall not be received; and an affidavit sworn before an attorney's clerk shall not be received, in cases where it would not be receivable if sworn before the attorney himself. And this rule is not to extend to affidavits to hold to bail.

REG. GEN. H. T. 2 *Will.* 4.

except affidavit to hold to bail.

AN affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney or his clerk.

REG. GEN. H. T. 1837. K. B. 3 *N. & P.* 2; 7 *Ad. & E.* 744, C. P.; 4 *Bing. N. S.* 367; S. R. 4 *Scott*, 478, Ex.; S. R. 3 *M. & W.* 153.

Affidavits sworn before a country commissioner or Judge of assize, may be received in any of the Courts, or before a Judge at chambers, or a Master.

IT is ordered, that, on and after the fourth day of this present Hilary Term, all affidavits, sworn before a commissioner in the country, or a Judge of assize on the circuit, be read in the several Courts of Queen's Bench, Common Pleas, and Exchequer, or before any Judge of the same, or any of the Masters thereof, in like manner as other affidavits, and without obliging the party filing them to obtain copies of the same.

* And that he understood it, or it cannot be received. (*Williams*, J.—*Haynes* v. *Powell*, E. T. 1835., B. C., 3 D. P. C. 599). And, in an affidavit, made by a foreigner, the commissioner of the bills of Middlesex certified, that it was interpreted by a sworn professor of the English and French languages to the deponent, who then swore to the belief thereof. This was held sufficient. (*Bosc* v. *Solliers*, T. T. 1825, K. B., 4 B. & C. 358; S. P. *Marzetti* v. *Comte du Joufray*, E. T. 1831, K. B., 1 D. P. C. 41).

† Affidavits intended to be received in the course of any proceeding, must be sworn either in the Court where intended to be received, or before one of the Judges sitting at Nisi Prius (*Rex* v. *Jolliffe*, 4 T. R. 285), or at chambers, or before a commissioner of the Court, authorized to take affidavits by stat. 29 Car. 2, c. 5, or before a commissioner empowered to take affidavits in Scotland or Ireland by 3 & 4 Will. 4, c. 42, s. 42. (*See Doe* d. *Cooper* v. *Roe*, E. T. 1828, Ex., 2 Y. & J. 284; 9 Price, 478; 12 Id. 149). And the Court has allowed an affidavit sworn before a commissioner of the Court of Exchequer in Ireland to be received (*Kilby* v. *Stanton*, 2 Y. & J. 75) in equity. (See *Griffin* v. *Smythe*, post, 125, n.).

Power of granting commissioners to take affidavits extended to Scotland by 3 & 4 Will. 4, c. 42, s. 42*.

By stat. 3 & 4 Will. 4, c. 42, s. 42, it is enacted, That the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, the said Courts of Law, and the several Judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said Courts respectively, as they now have in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and the Isle of Man, by virtue of the statutes now in force; and that all and every person or persons wilfully swearing or affirming falsely, in any affidavit to be made before any person or persons who shall be empowered to take affidavits under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open Court in which such affidavit shall be intitled, and be liable to be prosecuted for such perjury in any Court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge.

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Beaumont *v.* Dean, M. T. 1835. Ex. 1 *Tyrw. & G.* 209; S. C. 4 *D. P. C.* 354—S. P. Kidd *v.* Davis, E. T. 1837. B. C. 5 *D. P. C.* 568.

It is no objection that the commissioner before whom sworn was the party's attorney, unless shewn to be so when oath administered†.

On motion to set aside bail-bond, it was objected, that the commissioner before whom the affidavit was sworn was *now* the attorney of the party bailed. As it did not distinctly appear that he was so at the time of administering the oath, the Court overruled the objection.

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Watson *v.* Williamson. M. T. 1832. Ex. 1 *D. P. C.* 607.

Affidavit sworn in Scotland before a justice of the peace is receivable and may be read‡.

It was objected, that the affidavit was sworn before a justice of the peace at Lanark, instead of a Lord of Session; but the objection was overruled.

* By stats. 11 Geo. 4 & 1 Will. 4, c. 43, s. 4, all commissions for taking affidavits to be made use of or read in any Court, shall, notwithstanding any demise of the Crown, remain and continue in force during the pleasure of the succeeding sovereign, until the same shall be revoked or otherwise avoided. By the 11 Geo. 4 & 1 Will. 4, c. 70, s. 18, it is provided, that any person who shall have been duly appointed a commissioner for taking affidavits in any of the Courts abolished by that act, shall, upon producing his appointment before the proper officer, and upon the payment of one shilling, be entitled to have his name inserted in a list, to be kept for that purpose, of such commissioners, and to exercise, within the limits of his commission, the same power and authority, and for the same purposes, as if his commission had issued from one of *his Majesty's Courts at Westminster.*

† And the actual attorney in the cause, not merely of one seeking to be made a party, as in ejectment, the attorney of the landlord applying to be admitted to defend. (*Coleridge*, J.—*Doe* d. *Grant* v. *Roe*, H. T. 1836, B. C., 5 D. P. C 409). But, if the affidavit states the commissioner to be the attorney of the defendant, that is sufficient to raise the objection, though not sworn to. (*Haddock* v. *Williams*, M. T. 1838, B. C., 7 D. P. C. 327.

‡ But the Court of Queen's Bench have refused to receive an affidavit purporting to be sworn before a commissioner of the Court of Queen's Bench in Ireland only, and not acting under a commission from England. (*Williams*, J.—*Griffin* v. *Smythe*, E. T. 1840, B. C., 8 D. P. C. 490).

SHARP *v.* JOHNSTON, M. T. 1835. C. P. 2 *Scott*, 407; S. C. 4 D. *P. C.* 324; S. C. 2 *Bing. N. S.* 246.

The list of commissioners is conclusive as to whether a particular person be a commissioner or not*.

TINDAL, C. J.—The only question here is, whether Mr. Gaynor, before whom this affidavit is sworn, is a commissioner appointed under the provisions of the 3 & 4 Will. 4, c. 42, s. 42. I have obtained from my clerk his list of the persons appointed, and I do not find the name of Gaynor among them. He, therefore, had no right to take the affidavit.

## VI. WHEN THEY MAY BE USED, AND WITHIN WHAT TIME TO BE SWORN.

ATKINS *v.* MEREDITH, H. T. 1836. Ex. 4 *D. P. C.* 658.

It is said, that a rule which has been obtained without affidavit, cannot be opposed by affidavit.

A RULE had been obtained to set aside a verdict without affidavit:—The Court held, that none could be used in opposition.

REX *v.* GRANT, H. T. 1834. K. B. 5 *B. & Ad.* 1081; S. C. 3 *N. & M.* 106.

Affidavits are not receivable to shew that a Judge is mistaken in his report.

AT the trial of a criminal information for a libel, the Lord Chief Justice was of opinion, that certain evidence could not be received. On motion for a new trial, affidavits were produced contradicting the statement of the Judge as to what occurred at the trial before him; but the Court refused to receive them.

PERRING *v.* KYMER, H. T. 1835. K. B. 4 *N. & M.* 477.

Rule may be drawn up as "on reading an affidavit" which counsel undertakes shall be sworn the same evening;

ON motion to set aside an award, counsel stated, that he had moved for a rule to set aside an award under a mistaken supposition, that an affidavit, deposing to certain facts, had been sworn before the Court on the day after the granting a rule nisi.

He now applied for leave to draw up the rule, as, "upon reading such affidavit;" the Court said, We ought to adhere to the general rule, that the affidavits must all be prepared at the time of making the motion to the Court. However, if your affidavit is made and filed to-night it may perhaps do.

READ *v.* MASSIE, H. T. 1836. Ex. 4 *D. P. C.* 681.

and affidavit sworn before judgment actually signed may be used for the purpose of moving to set it aside:

UPON reference, costs to abide the event, and to be paid by the party, and at such time as the arbitrator should direct, who awarded in favour of the plaintiff, and divided the costs between them, the plaintiff treating the award as to costs as void, and threatening to issue execution; the defendant prepared affidavits before any judgment was signed; and the Court held that he was entitled to use them.

* Query—Whether, since 3 & 4 Will. 4, c. 42, s. 42, affidavits made in Scotland or Ireland are not required to be sworn before a commissioner who is appointed by the English Judges under that statute. (Vide *Sharp* v. *Johnston*, supra; and *Griffin* v. *Smythe*, 8 D. P. C. 490; ante 125, n.).

GRAHAM *v.* BEAUMONT, E. T. 1836. C. P. 3 *Scott*, 287; S. C. 5 *D. P. C.* 49—S. P. BRAINE *v.* HUNT, H. T. 1834. Ex. 2 *D. P. C.* 391—S. P. HICKS *v.* MARRECO, Ex. 3 *Tyrw.* 216.

IT was objected, that the affidavits proposed to be used in shewing cause, purported to have been sworn after the day when the rule was due; but the Court held, that, where no time is fixed for the filing, they might be sworn at any time before actually shewing cause.

Affidavit to shew cause may be sworn after the rule is due, if no time be fixed by the rule for filing them.

*See* 1 *Chit. Rep.* 27; *Id.* 136—*S. P. contrà Bagnall* v. *Shepham, H. T.* 1831. *Ex.* 1 *C. & J.* 577.

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DOE *d.* CLARKE *v.* STILLWELL, T. T. 1838. K. B. 3 *N. & P.* 701, overruling BURT *v.* OWEN, H. T. 1833. Ex. 1 *D. P. C.* 691.

ON motion to set aside an award, it was objected, that the rule was drawn up on an affidavit, made on the 4th May, 1837, of the due publication of the award; and was, therefore, more than a year old when the rule was obtained.

A motion may be made on an affidavit more than a year old, unless the lapse of time affects subject-matter of the affidavit*

*Per Cur.*—We never understood that there was any such rule of practice; and we find from the officers of the Court that it is perfectly new to them. There is such a rule as to an affidavit of debt; because, after the lapse of a year, it is presumed that the debt may be paid.

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PREEDY *v.* LOVELL, H. T. 1836. Ex. 4 *D. P. C.* 671.

ON shewing cause against a rule, it was objected, that the affidavits on which it had been obtained were irregular:—The Court held, that the counsel, on shewing cause, must at once elect, whether he would rely on the technical objection, or file his own affidavit in answer to the rule.

A party must elect to use his affidavits, or abandon them at once, unless an objection is taken to their sufficiency.

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## VII. WHEN THEY MAY BE USED A SECOND TIME IN THE SAME CAUSE OR FOR A DIFFERENT PURPOSE.

WORTHINGTON *v.* ————, T. T. 1835. Ex. 2 *C., M., & R.* 315; S. C. by name of PICKFORD *v.* EWINGTON, M. T. 1835. Ex. 1 *Tyrw. & G.* 29; S. C. 4 *D. P. C.* 453.

A JUDGE had made an order at chambers. Application was made to set it aside:—Held, that the affidavit used before the Judge might be referred to without being re-sworn, or any fresh affidavit made referring to or verifying it.

It is no objection to affidavits that they have been used for the same purpose before a Judge at chambers;

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CLIFFE *v.* PROSSER, E. T. 1833. Ex. 2 *D. P. C.* 21.

ON shewing cause against a rule to refer a bill of costs back to the Master, it was proposed to read the affidavit used before the officer on taxation, notice having been given of the intention to do so; but the Court refused to allow them to be used, unless referred to in the rule, but enlarged the rule on payment of costs of the day.

or before the Master on taxation; provided they be referred to in the rule, and notice of intention to read them given;

* See post, tit. "*Affidavit of Debt*"—"*Arbitration.*"

QUELLE *v.* BOUCHER, M. T. 1834. C. P. 1 *Scott*, 283; S. C. 3 *D. P. C.* 107, by nom. QUELLY *v.* BOUCHER.

but affidavits used in opposition to one rule, cannot be used in opposition to another, although involving the same subject-matter, unless re-sworn.

ON a rule coming on for argument, the Court discharged it. Another rule was afterwards obtained on a different ground. Counsel proposed to shew cause against this rule upon the same affidavits that had been sworn, but not used, on the first rule.

But the Court refused to receive them, not having been sworn with reference to the purpose for which it was now attempted to use them, but on a former motion, upon which the facts sworn to might have been material, though, perhaps, not so now, and therefore could not be used; as great additional difficulty would inevitably be interposed in the way of a successful prosecution for perjury, which, perhaps, might be wholly prevented.

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PIKE *v.* DAVIS, E. T. 1840. Ex. 8 *D. P. C.* 387.

After a matter has been disposed of at chambers, additional affidavits may be used on a similar motion to the Court.

AFFIDAVITS were produced at chambers on motion to set aside an execution; *Gurney*, B., dismissed the summons, because he considered the affidavits answered. On the same application being made to the Court, additional affidavits were produced. It was contended, that they could not be read, as they were not produced at chambers.

*Sed per Cur.*—A Judge's decision at chambers is not final, but the party may seek redress in the full Court; and if he has acquired additional facts, is entitled to have them considered.

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## VIII. WHEN TO BE FILED AND OFFICE COPIES TAKEN, AND WHEN THE LATTER MAY BE USED.

*Ex parte* DICAS, T. T. 1833. Ex. 2 *D. P. C.* 92—S. P. *Ex parte* ELDERTON, T. T. 1834. K. B. *Id.* 568—S. P. JOHNS *v.* MILLS, M. T. 1832. B. C. 1 *D. P. C.* 510—S. P. *In re* JEFFERY, M. T. 1832. Ex. 1 *C. & M.* 71.

Whether a motion be refused or granted, the affidavit on which it is made must be filed.

*Per Cur.*—Whenever affidavits are used in Court, they ought invariably to be filed and handed in by the counsel, and not handed back to the attorney. Whether the Court grants a motion upon affidavit, or refuses it, if any part of the affidavit is used, it ought to be filed.

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BARKER *v.* RICHARDSON, E. T. 1827. Ex. 1 *Y. & J.* 362.

So on enlarged rules*

A RULE having been enlarged upon the application of the defendant, who was allowed to use supplemental affidavits, which, however, had not been filed, it was objected, it could not be done, because it was not part of the terms of the rule.

* And in such case the affidavit intended to be used must be filed within the time prescribed by the rule, (*Williams*, J.—*Turner* v. *Unwin*, T. T. 1835, K. B., 4 D. P. C. 16; *Patteson*, J.—*Gilson* v. *Carr*, H. T. 1836, 4 Id. 618); and the Court will not allow them to be filed afterwards, unless it is clearly shewn that the not filing of them arose from inevitable accident. (*Patteson*, J.—*Wright* v. *Lewis*, H. T. 1840, B. C., 8 D. P. C. 298; S. P. *Turner* v. *Unwin*, T. T. 1835, K. B., 4 D. P. C. 16; See 1 Chit. Rep. 27; 8 Moore, 523).

*Sed per Cur.*—It is the practice in all the Courts, that, upon an enlarged rule, the affidavits should be filed, and the plaintiff ought not to be prejudiced by an informality in the rule*.

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ATTORNEY-GENERAL *v.* JEYES, H. T. 1832. Ex. 2 *C. & J.* 352.

ON a rule with respect to a revenue cause, the affidavit of the defendant had not been filed one day previous to the motion coming on. It was objected, that, according to the practice of the Court on the revenue side of the Exchequer, it ought to have been so filed.

But, *per Bayley*, B., I think now the practice is not strictly enforced.

And semble, they ought to be filed one day before rule comes on, on the revenue side of the Exchequer;

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WESTMORELAND *v.* PIKE, M. T. 1835. Ex. 1 *Tyrw. & G.* 227 —S. P. BROWN *v.* PROBERT, H. T. 1833. Ex. 1 *D. P. C.* 159.

ON shewing cause against a rule, it was stated that there had not been time to obtain office copies of the affidavit. The Court held, that that was indispensable; as the fees payable on the office copies are now public property, and form part of the revenue of the country.

and no cause can be shewn against a rule unless office copies of the affidavit be first obtained†;

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PITT *v.* COOMBS, H. T. 1835. K. B. 4 *N. & M.* 535.

A RULE had been obtained by plaintiff, calling on defendant to shew cause why certain money should not be returned to him, against which cause was now shewn; when a preliminary objection was taken, by reason that plaintiff had not obtained office copies of defendant's affidavits: but, upon the Master's reporting to the Court that the practice had not been strictly adhered to, the Court overruled the objection.

but the practice is not strictly enforced of taking office copies of affidavits in answer;

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REG. GEN. Ex. 9 *Price*, 298.

OFFICE copies of affidavits are not to be received or read in the Exchequer, unless signed by some accredited person who has examined them.

and in Exchequer, office copies cannot be read, unless signed by some accredited person‡.

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REG. GEN. H. T. 1838. K. B. 3 *N. & P.* 2; 7 *A. & E.* 744. C. P. 4 *Bing. N. S.* 367; 5 *Scott*, 478. Ex. 3 *M. & W.* 153.

IT is ordered that all affidavits read before a Judge of any of the said Courts, or before a Master of the same, shall be filed with the Masters of the said Courts, and be alphabetically indexed. Such affidavits to be delivered to the said Masters, in order to be filed, four times in the year; that is to say, the last day of each term.

Affidavits to be filed the last day of each term, and indexed.

* Where a matter is referred to the Master, and he, in the exercise of his discretion, has refused to allow further affidavits to be filed after a particular day, the Court will not interfere with that discretion, by requiring him to receive further affidavits. (*Patteson*, J.,—in the matter of *Hall* v. *Anderton*, H. T. 1840, B. C., 8 D. P. C. 326).

† And where made at chambers, though not filed, the adverse party is entitled to a copy. (*Tebbutt* v. *Ambler*, T.,T. 1839, Q. B., 7 D. P. C. 674).

‡ On motion for a new trial a witness made an affidavit. At trial the witness was called. An office copy of the affidavit had been admitted under a judge's order:—*Held*, that the witness might be cross-examined from the office copy of the affidavit. (*Gurney*, B.—*Davies* v. *Davies*, 1840, N. P., 9 C. & P. 252).

HARDING *v.* AUSTEN, H. T. 1824. C. P. 8 *Moore*, 523.

When affidavits have been mislaid, they may be read, although not filed within time.

AFFIDAVITS, on shewing cause upon a motion for a new trial, and which would have been ready if the Court had proceeded to hear the new trial, but the rule being enlarged on the last day of term the affidavits were mislaid in the interval. The Court allowed them to be read, although not filed within the time mentioned in the enlarged rule.

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PRICE *v.* HAYMAN, M. T. 1838. Ex. 7 *D. P. C.* 47.

When once filed may be used by the adverse party, though the party filing does not require them.

COUNSEL in this case said, that he did not intend to use some of the affidavits filed on an enlarged rule, if the Court should think that they could not be used by the other side. After reference to the Master, the Court held, that when affidavits are once filed they may be made use of by the opposite party.

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PILMORE *v.* HOOD, M. T. 1839. C. P. 8 *D. P. C.* 21. *Ex parte* ELDERTON *v.* LUCENA, T. T. 1834. B. C. 2 *D. P. C.* 568.

The Court will not entertain a substantive motion to compel a party to file affidavits previously used by him, unless he has been first requested to do so.

AFFIDAVITS had been used on a motion to set aside a bond, (*see post tit.* "*Arbitration*"). The application was refused, but the affidavits were not filed. The Court was applied to for a rule to compel the filing. But the Chief Justice said, "You had better supply the defect by applying to the party to file the affidavits."

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## IX. OF ILLEGIBLE WRITING, ERASURES, AND ALTERATIONS*.

BANE *v.* JONES, E. T. 1826. K. B. 8 *D. & R.* 114.

An affidavit illegibly and slovenly written may be objected to, and costs given against the party producing it;

AN affidavit in support of a rule for setting aside a judgment and execution was closely written, in a very small cramped hand, and on a very small piece of paper. The Court said—By way of shewing our disapprobation of putting such an affidavit as this on the files of the Court, we shall discharge this rule, but not with costs, which we should otherwise have done.

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WRIGHT *v.* SKINNER, E. T. 1836. Ex. 5 *D. P. C.* 92.

and any material alteration after it has been sworn renders the affidavit a nullity†.

IT was objected, that, since an affidavit had been sworn, the words "the paper writing marked A. is a true copy," had been inserted. The Court held the affidavit to be a nullity.

* In the Queen's Bench, there is a positive rule, (R. M. 37 Geo. 3), that no affidavit shall be read or made use of in any matter depending in that Court, in the jurat of which there shall be an erasure or interlineation; and in practice the other Courts have adopted the same rule.

† Making an addition to an affidavit after it is sworn, does not render it void, but the Court will only use the original part; (*White* v. *Skinner*, 1 Tyrw. & G. 597); and it had been before held, that inserting a title, when omitted, was not such an alteration as to render a new stamp necessary. (*Prince* v *Nicholson*, 1 Marsh, 70; S. C. 5 Taunt. 333).

FINNERTY *v.* SMITH, E. T. 1835. C. P. 1 *Bing. N. C.* 649; S. C. 1 *Scott*, 743.

AN order for better particulars had been obtained. On application to set it aside, it was granted, on its being shewn, that the jurat of the affidavit used before the judge had been, without authority, altered by the attorney.

Even in the jurat*.

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WILLIAMS *v.* CLOUGH, E. T. 1834. K. B. 1 *Ad. & E.* 376.

RULE, Mich. T., 37 Geo. 3, provides, "That no affidavit be read or made use of in any matter depending in this court, in the jurat of which there shall be any interlineations or erasures. The jurat had been commenced thus: "Resworn at Brynhyfrid;" the words, "at Brynhyfrid" had been struck out, by drawing a slight line through them.

It was contended, that the rule only applied to concealed erasures, and not those legible to the Court.

But the Court were of a different opinion, and said, the principle of the rule is, that there shall be no alteration.

So, an erasure by a line drawn through part of the jurat, vitiates the affidavit;

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JACOB *v.* HUNGATE, H. T. 1835. Ex. 3 *D. P. C.* 456.

THE real date of the jurat was January 31, but the 3 appeared to have been *written over* a 2. *Parke*, B., held it to be sufficient, as it was neither an erasure nor interlineation.

but not unless it amounts to an erasure or interlineation.

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## X. OF DEFECTS IN, AND WAIVER OF THEM.

CLOTHIER *v.* ESS, E. T. 1833. C. P. 3 *M. & Scott*, 216; S. C. 2 *D. P. C.* 731—S. P. *Barham* v. *Lee*, H. T. 1834; C. P. 2 *D. P. C.* 779; S. C. 4 *M. & Scott*, 327.

COUNSEL appeared to shew cause against a rule on the merits, but took a preliminary objection, that the Christian name of one of the parties was omitted in the title. The Court held, he was entitled to pursue that course, and did not waive the irregularity by appearing.

A party, by appearing to oppose a rule, does not waive any objections to the form of the affidavit†.

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## XI. OF AMENDING AFFIDAVITS.

COOPER *v.* ARCHER, H. T. 1823. Ex. 12 *Price*, 149.

IN this case, the wrong year was inserted in the jurat of an affidavit; the Court, viewing it as a mere clerical and obvious error, permitted it, on production of a supplemental affidavit, to be amended.

A palpable mistake in the jurat may be amended on producing a supplemental affidavit.

* But an amendment of the jurat, by striking out "before me," and inserting "by the Court," affords no objection to the reception of the affidavit. (*Austin* v. *Grange*, H. T. 1836, B. C., 4 D. P. C. 576).

† And where an affidavit cannot be read from some technical defect, the Court cannot be referred to, or act upon any paper mentioned in the rule and annexed to the latter. (*Littledale*, J.—*Harris* v. *Mathews*, H. T. 1836, B. C., 4 D. P. C. 608). Where rules are discharged upon such formal objections, it is discretionary with the Court as to costs.

GOODRICKE *v.* TURLEY, M. T. 1835. Ex. 2 *C., M., & R.* 636; S. C. 1 *Tyrw. & G.* 146; S. C. 4 *D. P. C.* 392—*Semb. overruling* PHILLIPS *v.* HUTCHINSON, M. T. 1834. K. B. 3 *D. P. C.* 20.

And where there is defect in the jurat, a rule may be enlarged to afford time to reswear the affidavit*.

A RULE had been obtained on the 17th, upon an affidavit, in which the names of the persons deposing to its contents were not inserted in the jurat: it was holden, that a correct affidavit, sworn on the 18th, could not be read; that the proper course was, to reswear the original affidavit, the rule being enlarged for that purpose, or for time to allow a new affidavit to be filed.

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COOPER *v.* TALBOT, E. T. 1839. C. P. 7 *Scott*, 345.

So, where an affidavit is erroneously intitled, it may be amended on being resworn.

AN affidavit was intitled, "J. C. *v.* T.," instead of "E. C. *v.* T." On an objection being taken, that the affidavit could not be received, the title being defective,

*Per Cur.*—We do not see why the affidavit should not be amended and resworn. It is too much to say, that the right of a party should be lost from a mere mistake in intitling an affidavit.

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PHILLIPPS *v.* HUTCHINSON, M. T. 1834. B. C. 3 *D. P. C.* 20—S. P. PLANT *v.* BUTTERWORTH. Ex. 5 *Tyrw.* 183.

But it has been said, an affidavit cannot be taken off the file to be amended†.

*Per Littledale*, J.—With respect to the question of amendment, it appears to me, that the title cannot be amended. How can you have an affidavit dated one day, in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then, it is said, that the rule may be enlarged: there, also, the same objection will arise; because, then, it must be the original rule which is discharged or made absolute.

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ROBINSON *v.* GARDNER, T. T. 1839. Q. B. 7 *D. P. C.* 716.

So, an affidavit cannot be amended after cause shewn against a rule.

AN affidavit in support of a motion to discharge a defendant out of custody, under the 1 & 2 Vict. c. 110, did not state that the defendant did not intend to leave England, but merely that he was not going to the continent.

*Per Cur.*—We cannot allow an amendment; we should be setting a very bad example, if, in such cases as the present, we were to permit an affidavit to be amended after motion.

* So time has been obtained, on payment of costs, to amend the title of an affidavit,—the opposite party being at liberty to file affidavits in reply. (*Patteson, J.—Rex* v. *Justices of Warwickshire*, H. T. 1836, B. C., 5 D. P. C. 382). And on application to re-admit an attorney, the jurat of the affidavit omitted the names of the deponents, through the inadvertence of the judge's clerk. *Patteson*, J., allowed it to be amended. (*Ex parte Smith*, T. T. 1834, Q. B., 2 D. P. C. 607).

† Though, when the defect is in an affidavit used in shewing cause, the rule may be enlarged to allow an amendment. (*Anderson* v. *Ell*, M. T. 1834, K. B.; 3 D. P. C. 73). The right to amend an affidavit seems to depend upon whether the defect is in an affidavit on which a rule has been obtained, or which has been already filed, or only in affidavits used in shewing cause, or in moving for a rule Nisi. In the two latter instances they are clearly amendable; in the former they are not, for the reason given by *Littledale*, J., supra.

## XII. OF INTRODUCING IMPERTINENT, IRRELEVANT, OR SCANDALOUS MATTER*.

THOMPSON *v.* DICAS, T. T. 1833. Ex. 2 *D. P. C.* 93—S. P. REX *v.* BYRNE, M. T. 1837. Q. B. 6 *D. P. C.* 36.

Introduction of impertinent and irrelevant matter in an affidavit will induce the Court to deprive party of his costs, though otherwise entitled to them;

IN this case, the Court made a rule absolute for setting aside proceedings for irregularity, but referred the affidavit in support of the rule to the Master; who, having reported that certain parts of them were impertinent and irrelevant, made the rule absolute, without costs.

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CASSEN *v.* BOND, M. T. 1828. Ex. 2 *Y. & J.* 531—S. P. LEWIS *v.* WOOLRYCH, E. T. 1835. Ex. 3 *D. P. C.* 692.

and for irrelevant matter the Court have disallowed the costs of such matter, and directed payment of costs to the opposite party.

ON its being objected, that the affidavits used in this case contained irrelevant matter, the Court directed the Master to ascertain what parts of the affidavit were material to raise the question of practice before the Court, and to allow to the defendant such parts only in his taxation of the costs, and to the plaintiff his costs occasioned by such parts of the affidavits as were immaterial to the question in dispute between the parties.

## XIII. OF JUSTICES RECEIVING VOLUNTARY AFFIDAVITS.

Justices are not to administer oaths, &c., touching matters whereof they have no jurisdiction by statute.

BY 5 & 6 Will. 4, c. 62, s. 13, after reciting, that a practice had prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received: And whereas doubts have arisen, whether or not such proceeding is illegal, for the more effectual suppression of such practice, and removing such doubts, be it enacted, that, from and after the commencement of this act, it shall not be lawful for any justice of the peace, or other person, to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof, respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give

* When affidavits contain irrelevant or impertinent matter, the party by whom they are filed may be punished by the infliction of costs, at the discretion of the Court; (*Ex parte Heullen*, 7 Price, 594); and if defamatory or scandalous matter be introduced unnecessarily in an affidavit, it may cause the rejection of the deposition. (*Sanderson's Bail*, 1 Chit. R. 676; *Williams* v. *Hunt*, Id. 321).

validity to instruments in writing, designed to be used in such foreign countries respectively.

But the 18th section provides, That it may be necessary and proper, in many cases not therein specified, to require confirmation of written instruments, or allegations or proof of debts, or of the execution of deeds or other matters, and enacts, that it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declarations of any person voluntarily making the same before him in the form in this act mentioned; and if any declaration so made be false in any material particular, the person wilfully making the same shall be deemed guilty of a misdemeanor.

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## Affidavit of Debt*.

(1 *Peters. Ab.* 378).

See also tits. *Affidavit—Arrest—Bail.*

I. BY WHOM TO BE MADE, p. 136.

II. BEFORE WHOM TO BE SWORN, p. 136.

III. WITH WHOM TO BE FILED, p. 136.

IV. WHEN AND HOW TO BE MADE UNDER 1 & 2 VICT. c. 110, p. 136.

V. GENERAL QUALITIES OF, CONSTRUCTION OF, AND CORRESPONDENCE WITH PROCESS.

* The act for the abolition of arrest on mesne process having rendered the very large collection of decisions, as to the technical form and general requisites of the affidavit to hold to bail, of little practical utility, (except for the purpose of illustration), it has been thought preferable to insert the points determined in each case as shortly as possible, in notes, under appropriate divisions, than to encumber the text with a full abridgment of the authorities themselves. The affidavit required by the 1 & 2 Vict. c. 110, s. 3, is materially different, both in the matter it is to embody, and the mode in which it is to be used, from the deposition required under the 12 Geo. 1, c. 29, which enacted, "that in all cases where the plaintiff or plaintiff's cause of action shall amount to the sum of 10*l.* or upwards, affidavit shall be made and filed of such cause of action; which affidavit may be made before any judge or commissioner of the Court out of which such process shall issue, authorized to take affidavits in such Courts, or else before the officer who shall issue such process, or his deputy; which oath such officer, or his deputy, are hereby empowered to administer; and the sum or sums specified in such affidavit shall be indorsed on the back of such writ or process, and for which the Sheriff shall be directed to take bail, and for no more."

The 7 & 8 Geo. 4, c. 7, s. 1, extended the provisions of this statute to debts and demands for 20*l.*, and upwards. *See tit. "Arrest."*

Under these acts, all that was required to be stated was the existence of a cause of action for a pecuniary claim in the plaintiff, and that the money was actually owing. No judge's order was requisite to authorize the arrest of the party; and no preliminary measures were necessary to enable any actual or pretended creditor to swear to the fact of a debt being owing, to enable him, without notice, warning, or inquiry, to sue out bailable process. By the recent statute, this power is entirely annulled, and a new mode of proceeding prescribed. *See post, tit. "Arrest."*

An affidavit of debt is a business pending in Court, over which all the Judges have a common jurisdiction. (*Driffill* v. *Taylor*, E. T., 1838, 4 Bing. N. S. 369; S. C. 6 Scott, 141).

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I. BY WHOM TO BE MADE*.
II. BEFORE WHOM TO BE SWORN†.
III. WITH WHOM TO BE FILED‡.

## IV. WHEN AND HOW TO BE MADE UNDER 1 & 2 VICT. c. 110.

The affidavit must state not only the existence of a debt, but that there is probable cause for believing

The 3rd section provides, "That if a plaintiff in any action in any of her Majesty's superior Courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a Judge, or without such order, shall, by the affidavit of himself, or of some other person, shew, to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action

* The affidavit need not be sworn to by the creditor himself, (1 Chit. Rep. 58), and, if made by one of several creditors, it suffices, (4 T. R. 176); and may be made without consent of co-creditor, (1 Lord Raym. 381). When made by an agent, it is not essential to shew his connexion with the creditor, or state that he is agent, (1 Chit. Rep. 10, 5 D. P. C. 485), or explain his means of knowing the facts disclosed, (4 Taunt. 231), provided he swear positively to the existence of the debt. (*Short* v. *Campbell*, H. T. 1835, Ex., 3 D. P. C. 487; *Lee* v. *Sellwood*, Ex., 9 Price, 322; S. P. *Holliday* v. *Lawes*, H. T. 1837, C. P., 3 Bing. 541; S. C. 5 D. P. C. 485; See also *James* v. *Trevanion*, 5 D. P. C. 275). The conviction of a party for a conspiracy does not render him incompetent to make the affidavit. (*Park* v. *Strockley*, 4 D. & R. 144; sed vide 2 Salk 461; 7 Mod. 413).

† The party administering the oath must be duly authorized, or the defendant will be discharged. (*Hughes* v. *Jones*, M. T. 1830, K. B., 1 B. & Ad. 388). When sworn before a commissioner of Common Pleas in vacation, the Chief Baron of the Exchequer may grant an order to act upon it. (*Griffin* v. *Taylor*, E. T. 1838, C. P., 6 D. P. C. 620). If sworn before a commissioner, he must be correctly described. (*Howard* v. *Brown*, M. T. 1827, C. P., 4 Bing. 393; S. C. 1 M. & P. 22; see *Rex* v. *Hare*, 13 East, 189).

The party before whom sworn, by 12 Geo. 1, c. 19, s. 12, must be an officer appointed to issue process, not merely to take affidavits. (*Rogers* v. *Jones*, T. T. 1827, K. B., 7 B. & C. 86); and it was on one occasion held, that an affidavit sworn before the signer of bills of Middlesex, before the 2 W. 4, c. 39, was in force, would not authorize the issuing a writ of *capias* since that act came into operation; (*Beck* v. *Young*, H. T. 1834, K. B., 2 D. P. C., 462); but this case was afterwards overruled. (*Young* v. *Beck*, M. T. 1834, Ex., 1 C., M., & R. 448; S. C. 3 D. P. C. 280; S. C. 5 Tyrw. 24).

When sworn in Ireland before a party not a commissioner of the English but only of the Irish Courts, it must be verified. (*Sharp* v. *Johnston*, M. T. 1835, C. P., 2 Bing. N. S. 246; S. C. 2 Scott, 405; S. C. 4 D. P. C. 324); but need not when sworn in Scotland before a party describing himself a commissioner by virtue of a commission from the Courts of Common Pleas and Exchequer. (*White* v. *Irving*, M. T. 1836, Ex. 2 M. & W. 127; S. C. 5 D. P. C. 289).

An affidavit of debt made before a British Consul must not be for £— sterling, without shewing whether it is British or Irish sterling money. (*Pickardo* v. *Machado*, M. T. 1825, K. B., 4 B. & C. 886; S. C. 7 D. & R. 478).

By rule H. T. 2 Will. 4., it is ordered, where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; *but this rule shall not extend to affidavits to hold to bail.*

‡ The affidavit must formerly have been filed with the filacer of the proper county into which the capias issued. (*Dorville* v. *Whoomwell*, E. T. 1825, C. P., 3 Bing. 29; S. C. 10 Moore, 318); or other officer empowered to issue process. See *Haymond* v. *Anderson*, 2 B. Moore, 192; but, since the 1 & 2 Vict. c. 110, it is left at the judge's chambers by whom the order to hold to bail is granted.

against the defendant, or defendants, to the amount of twenty pounds, or upwards, or has sustained damage to that amount; and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of capias shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued. Provided always, that the said writ of capias, and all writs of execution to be issued out of the superior Courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Chancellor of the county palatine of Durham, or his deputy there."

that the defendant is about to quit England.

The authority with which the Courts and Judges at Westminster are invested by this section is expressly extended to the Courts of Lancaster and Durham, by the 21st section; but it is therein provided, "That no order, or other proceeding, under this act, made by any justice or justices of the said Court of Common Pleas of the county palatine of Lancaster, or the Court of Pleas in the county palatine of Durham, shall be valid or effectual, except made in open Court, on one of the court or return days of the same Court, or except such justice or justices shall be also a Judge or Judges of one of the said Courts at Westminster: Provided also, That no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice, or justices of the Court of Pleas in the county palatine of Durham, who shall not be a Judge or Judges of one of the said Courts of common law at Westminster."

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BATEMAN *v.* DUNN, M. T. 1838. C. P. 5 *Bing. N. S.* 49; 7 *D. P. C.* 105; S. C. 6 *Scott*, 739.

IN an action against the acceptor of a bill of exchange, a Judge's order had been made to arrest the defendant, under 1 Vict. c. 110. On motion to discharge him out of custody, on the ground that the affidavit of debt was insufficient, the deponent only swearing he had been informed by the person who was the drawer of the bill, and he believed the defendant was a barrister, practising in the Irish Courts, and that his usual place of abode was in Ireland, and also that the defendant had no permanent place of residence in England, and was about to return, or had actually returned, to his usual place of abode, in Ireland.

The deponent must state that he believes the defendant "is about to quit England unless apprehended," and set forth the grounds for such belief;

*Per Cur.*—By 1 & 2 Vict. c. 110, it is directed that the order must be granted on an affidavit made by the plaintiff himself, or by some person on his behalf, which must shew, "to the satisfaction of the

Judge of one of the superior Courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damage to that amount; and that there is a probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended." Now, the affidavit should shew the belief of the party swearing it, that the defendant is about to quit England, unless he be forthwith apprehended; and must also proceed further, and shew the probable cause on which that belief is grounded, in order that it may be submitted to the consideration of the Judges. The affidavit is therefore insufficient.

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LARCHIN *v.* WILLAN, M. T. 1838. Ex. 4 *M. & W.* 351; S. C. 7 *D. P. C.* 11.

and that he will be absent such a length of time as to deprive the plaintiff of the fruits of his judgment.

ON an application for an order to detain a defendant, under the 1 & 2 Vict. c. 110, on an affidavit that defendant was an officer in the army, that his regiment was in Ireland, and the deponent believed that he was about to leave this country, the defendant swore in answer that his regiment was abroad, that he was in England on official business, and had no intention of going abroad, but merely into Ireland in obedience to orders of his superiors. *Coltman*, J., and *Tindal*, C. J., thereupon refused the order, but subsequently *Gurney*, B., granted it.

On motion to rescind the order—*Per Cur.* We must refuse the rule, and the criterion is, that if the party is only going to leave England for a short time, the case does not come within the statute; but if he be going for such a purpose, or for such a length of time, so that he is not likely to be forthcoming when the plaintiff, by the ordinary course of law proceedings, would be entitled to judgment, and to have his body in execution, he has a right to prevent his departure.

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## V. GENERAL QUALITIES OF*, CONSTRUCTION OF, AND CORRESPONDENCE WITH PROCESS.

* The affidavit must, 1st, Be direct and positive in stating the existence of the debt or other cause of action, unless the facts are not within the personal knowledge of the deponent, when he may swear to the best of his belief; 2ndly. It must be express, certain, and explicit as to the nature of the cause of action, and the means by which such cause of action was created; 3rdly. It must be intelligible, and free from ambiguity; 4thly. It must be single, both with regard to the action and the parties; and 5thly. It must correspond in substance with the process and declaration in the description of the parties, the subject-matter of the suit, and the form of action. (See Petersdorff on Bail, 142). We have seen it need not disclose the connexion between the creditor and the deponent. (*Lee* v. *Sellwood*, Ex. 9 Price, 322; S. P. *Short* v. *Campbell*, H. T. 1835, Ex., 3 D. P. C. 487; *Holliday* v. *Lawes*, H. T. 1837, C. P., 3 Bing. 541; S. C. 5 D. P. C. 485; S. C. 4 Scott, 354). It should not be for a less sum than that indorsed on the writ. (*Cook* v. *Cooper*, M. T. 1837, K. B., 7 A. & E. 605). An affidavit which discloses the existence of a condition precedent must aver its performance; (*Elworthy* v. *Maunder*, C. P., 5 Bing. N. S. 295); and shew a clear liability on the part of the defendant to have been incurred by him; (*Townsend* v. *Burns*, E. T. 1832, Ex., 2 C. & J. 468; S. C. 1 D. P. C. 562); and allege the debt to be due and payable; (*Smith* v. *Kendall*, 1824, K. B., 7 D. & R. 232); therefore, where money is to be paid on demand, a demand of it must be stated. (*Driver* v. *Hood*, M. T. 1827, K. B., 7 B. & C. 494; S. C. 1 M. & R. 324). The process being general, and the affi-

## VI. IN PARTICULAR ACTIONS.

(*a*) FOR MONEY LENT*.

(*b*) FOR MONEY PAID, LAID OUT, AND EXPENDED†.

(*c*) FOR MONEY HAD AND RECEIVED‡.

(*d*) FOR INTEREST§.

(*e*) FOR GOODS SOLD‖.

davit of debt by the plaintiff, as an executor, furnishes no ground for cancelling the bail-bond. *Bayley*, B., observing, that, upon general process, the plaintiff may declare qui tam, or in autre droit, as executor. (*Ilsley* v. *Ilsley*, H. T. 1832, Ex., 2 C. & J. 330; S. C. 2 Tyrw. 214; See 6 T. R. 363; 1 B. & P. 49; 2 N. R. 82; 1 B. & Ad. 19). See post tit. "*Declarations.*"

* The affidavit should state by whom the money was lent; (*Smith* v. *Stevens*, 3 Tyrw. 219); and the power of the party, when acting for others, to lend must be shewn; but the omission of such a statement is merely an irregularity, and does not render the affidavit a nullity; (*Spencer* v. *Newton*, H. T. 1837, K. B.; 1 N. & P. 823); but an affidavit sufficient for money lent, though not alleged to have been lent to the defendant. (*Bennett* v. *Dawson*, E. T. 1828, C. P., 4 Bing. 609; S. C. 1 M. & P. 594). An affidavit for "money lent and advanced, and interest thereon," is bad; because the 28th sect. of 3 & 4 Will. 4, c. 42, does not give the party an absolute right to interest, but allows the jury to give it if they think fit so to do. (*Callum* v. *Leeson*, H. T. 1834. Ex., 2 C. & M. 406; S. C. 2 D. P. C. 381; S. C. 4 Tyrw. 266; see 1 C. & M. 621; 10 Bing. 334). It has been held, that an affidavit on balance of account, money paid, laid out, and expended, should disclose how much is due on each; (*Visger* v. *Delegal*, T. T. 1831, K. B.; 2 B. & Ad. 571; S. C., 1 D. P. C. 333); although this is now considered to be unnecessary. (*Hague* v. *Levi*, H. T. 1833, C. P., 1 D. P. C. 720; S. C. 9 Bing. 595; S. C. 2 M. & Scott, 729).

† The affidavit for this purpose must allege, that the money was paid, laid out, and expended for the defendant, (*Fricke* v. *Poole*, E. T. 1829, K. B., 9 B. & C. 543; S. C. 4 M. & R. 448), and at his request. (See post, *Reg. Gen.* H. T. 1833; *Pitt* v. *New*, M. T. 1828, K. B., 8 B. & C. 654; S. C. 3 M. & R. 129).

‡ An affidavit for money had and received by the defendant, and on account of the plaintiff, but not proceeding to state to the *plaintiff's use*, has been deemed insufficient. (*Kelly* v. *Curzon*, H. T. 1836, K. B., 4 A. & E. 622).

§ Where the affidavit is on an action for interest, it must be shewn to be payable in respect of a contract to that effect; (*Drake* v. *Harding*, T. T. 1835, K. B., 4 D. P. C. 35); but describing the debt to be for money lent, and for interest thereon *agreed* to be paid, is sufficient; (*Harrison* v. *Turner*, T. T. 1835, K. B., 4 D. P. C. 73); for the word 'agreed' imports the assent of both plaintiff and defendant that the debt should be with interest. (*Hutchinson* v. *Hargrave*, M. T. 1834, C. P., 1 Bing. N. S. 369; S. C. 1 Scott, 269). And even an affidavit for money lent, interest, and account stated, without shewing a contract for interest, has been held sufficient. (*Pickman* v. *Collis*, H. T. 1835, Ex., 3 D. P. C. 429). So, a positive statement for interest due, without stating the amount of the principal on which it accrues, or the time when it began to run; (*White* v. *Sowerby*, E. T. 1835, K. B., 3 D. P. C. 584; S. P. *Pickman* v. *Collis*, Id. 429); and it seems, when a claim is made for principal and interest, and a sum and date are mentioned from which interest can be computed, the affidavit is sufficient. (*Rogers* v. *Godbold*, M. T. 1834, C. P., 3 D. P. C. 116). Where the affidavit is for a balance *and interest* on a promissory note, it is insufficient, without shewing how much is due in respect of each. (*Latraille* v. *Hoepfner*, M. T. 1833; 10 Bing. C. P. 334; S. C. 3 M. & Scott, 800; S. P. *Westmacott* v. *Cook*, 2 D. P. C. 519).

‖ An affidavit stating defendant to be indebted to plaintiff for goods sold and delivered, without saying by whom sold, is bad. (*Snell* v. *Anderton*. T. T. 1829. C. P., 3 M. & P. 269). Where a defendant has undertaken to pay for goods sold to a third person, in the event of the latter not paying for them, he may be holden to bail on the common affidavit for goods sold. (*Cope* v. *Joseph*, 9 Price, 155). A defendant cannot be holden to special bail on an affidavit stating him to be indebted to the plaintiff in a certain sum for goods sold, unless it be also

(*f*) For use and hire*.

(*g*) For use and occupation†.

(*h*) On awards‡.

(*i*) On bills of exchange and promissory notes‖.

stated that they were delivered. (*Lascar* v. *Morioseph*, M. T. 1823, C. P., 1 Bing. 357; S. C. as *Loisada* v. *Marjoseph*, 8 B. M. 366).

Merely stating that the defendant sold goods for the plaintiff, and had guaranteed the payment, not disclosing the terms of the arrangement between them, is bad. (*Angus* v. *Robilliard*, T. T. 1833, Ex., 2 D. P. C. 90). But an affidavit "for goods sold and delivered by the plaintiff to the defendant," without the words "at his request," is sufficient. (*Rowley* v. *Bayley*, E. T. 1826, C. P., 11 Moore, 380).

* Stating that defendant was indebted in £—— for the hire of a berth in a vessel of the plaintiff's, let by the plaintiff to the defendant, at his request, sufficient. (*Shepherd* v. *O'Brien*, T. T. 1836, Ex. 1 M. & W. 601; S. C. 1 Tyrw. & G. 913; S. C. 5 D. P. C. 173).

† An affidavit for use and occupation, and money paid, must state a request. (*Reeves* v. *Hucker*, M. T. 1831, Ex. 2 C. & J. 44; S. C. 2 Tyrw. 161); and stating the cause of action to be for the use and occupation of premises of the creditor as tenant thereof, without adding "to the creditor," suffices. (*Lee* v. *Selwood*, Ex. 9 Price, 322).

‡ An affidavit merely stating that defendant is indebted to plaintiff upon an award is bad. (*Driver* v. *Hood*, M. T. 1827, K. B., 1 M. & R. 324). As the affidavit should state the submission to reference, amount of money due, and that the sum is unpaid. (*Anon.* M. T. 1830, K. B., 1 D. P. C. 5).

‖ The affidavit must shew the note or bill to be due and unpaid. (*Bell* v. *Rogers*, Ex., 12 Price, 194), and disclose in what character the plaintiff sues, (*Bell* v. *Rogers* Ex., 12 Price, 17), and shew the amount for which the security was drawn, as otherwise part of the sum claimed might be for interest. (*Brook* v. *Coleman*, E. T. 1833, Ex., 2 D. P. C. 7; S. C. 3 Tyrw. 593; S. C. 1 C. & M. 621; S. P. *Westmacott* v. *Cook*, Ex. 1834, 2 D. P. C. 569; semb. overruling *Hanley* v. *Morgan*, H. T. 1832, 2 C. & J. 331; S. C. 1 D. P. C. 322; S. P. *Latraille* v. *Hoepfner*, M. T. 1833, C. P., 10 Bing. 334; S. C. 3 M. & Scott, 800; S. C. 2 D. P. C. 758; S. P. *Lewis* v. *Gompertz*, H. T. 1832, Ex., 1 D. P. C. 319; S. P. *Fowell* v. *Petre*, M. T. 1836, B. C., 5 D. P. C. 276; S. P. *Molineux* v. *Dorman*, E. T. 1835, Ex., 3 D. P. C. 662). Hence, merely stating that the defendant is indebted to the plaintiff in a named sum for principal is not sufficient. (*Fowell* v. *Petre*, and *Wright* v. *Elliot*, M. T. 1836, K. B., 5 A. & E. 818; S. C. 1 N. & P. 227; S. C. 5 D. P. C. 276).

The date need not be stated if it appear that the day of payment is passed. (*Shirley* v. *Jacob*, M. T. 1834, C. P., 3 D. P. C. 101; S. C. 1 Scott, 67; S. P. *Irving* v. *Heston*, H. T. 1836, C. P., 4 D. P. C. 638; *Weedon* v. *Medley*, T. T. 1834, Ex. 2 D. P. C. 689).

So, in action by indorsee against drawer, alleging the acceptance, "and which having become due is wholly unpaid," is sufficient. (*Weedon* v. *Medley*, T. T. 1834, Ex., 2 D. P. C. 689). Semble, contra that an averment of presentment and default must be shewn, even under Judge's order, under 1 Vict. c. 110. (*Hopkinson* v. *Salembier*, T. T. 1837, Ex., 7 D. P. C. 493).

It must describe the parties with certainty, saying, "bill accepted by a firm of four parties, in name of firm, or one of them cannot be sustained." (*Harmer* v. *Ashby*, E. T. 1825, C. P., 10 Moore, 323); nor can an affidavit describing the plaintiff as indorsee of a bill, without stating by whom it was indorsed to him. (*Lewis* v. *Gompertz*, H. T. 1832, Ex., 2 C. & J. 352; S. C. 2 Tyrw. 317; C. P. S. C. 1 D P. C. 319; S. P. *Woolley* v. *Escudier*, H. T. 1832, C. P., 2 M. & Scott, 392; S. P. *M'Taggart* v. *Ellice*, E. T. 1827, C. P. 4 Bing. 114; S. C. 12 Moore, 326); yet an indorsee need not shew that the bill was payable to order. (*Hughes* v. *Brett*, M. T. 1829, C. P., 6 Bing. 239; S. C. 3 M. & P. 566; See *Bradshaw* v. *Saddington*, 7 East, 94); nor need he describe himself as such, if he otherwise shews his title to the note; nor is it necessary that the default of the maker should be shewn in an action by such indorsee against the maker, (*James* v. *Trevanion*, M. T. 1836, B. C., 5 D. P. C. 275), or against the acceptor of a bill. (*Usborne* v. *Pennell*, E. T. 1834, C. P., 4 M. & Scott, 431).

In an action by indorsee against drawer, the affidavit, it is said, need not allege presentment to the acceptor, or notice of dishonour as the drawer. (*Witham* v.

(*j*) On an account stated *.

(*k*) On special agreements and guarantees†.

*Gompertz*, M. T., 1835, Ex., 2 C., M., & R., 736; S. C. 1 Tyrw. & G. 6, S. C. 4 D. P. C. 382, semble overruling *Simpson* v. *Dick*, E. T. 1835, Ex., 3 D. P. C. 731). Sed qu. *Hopkinson* v. *Salembier*, ante, 140 n., and infra.

But in an action against the drawer, default by the acceptor must be shewn; (*Cross* v. *Morgan*, M. T. 1831, K. B., 1 D. P. C. 122; S. P. *Buckworth* v. *Levy*, H. T. 1831, C. P., 7 Bing. 251; S. C. 5 M. & P. 23; S. C. 1 D. P. C. 211); S. P. *Banting* v. *Jadis*, T. T. 1832, 1 D. P. C. 445; S. P. *Cross* v. *Morgan*, M. T. 1831, Id. 122); and this not by way of inference, but directly. (*Simpson* v. *Dick*, E. T. 1835, Ex., 3 D. P. C. 731; S. P. *Crosby* v. *Clarke*, E. T. 1836, Ex., 1 M. & W. 296; *Banting* v. *Jadis*, 1 D. P. C. 445; *Smith* v. *Escudies*, Ex., 3 Tyrw. 219; S. P. *Crosby* v. *Clarke*, E. T. 1836, Ex., 1 M. & W. 296; S. C. 5 D. P. C. 62; contra, *Irving* v. *Eaton*, H. T. 1836, C. P. 2 Scott, 798; S. C. 4 D. P. C. 638).

In an action against acceptor, it suffices to state that the bill was payable "at a day now past," without alleging that it was unpaid or dishonoured, (*Phillips* v. *Turner*, M. T. 1834, Ex., 3 D. P. C. 163; S. C. 5 Tyrw. 106; S. C. 1 C., M., & R., 597).

So, stating defendant to be indebted on a bill drawn and accepted by him, is sufficient. (*Harrison* v. *Rigby*, M. T. 1837, Ex., 6 D. P. C. 93; S. C. 3 M. & W. 66).

Where affidavit was bad for not shewing default on the part of the acceptor of a bill of exchange against the drawer; but the affidavit being correct as to another claim, sufficient to hold the defendant to bail, and the amount indorsed on the capias, held sustainable as to that part. (*Caunce* v. *Rigby*. M. T. 1837, Ex., 3 M. & W. 67).

Stating debt to be a certain sum upon the balance of a bill of exchange, is good. (*Walmesley* v. *Dibdin*, H. T. 1830, C. P., 4 M. & P. 10); but not for principal monies due on a bill of exchange. (*Fowell* v. *Petre*, M. T. 1836, K. B., 1 N. & P. 227; S. C. 5 D. P. C. 276).

An affidavit on a note payable by instalments should shew them to be due; it is not sufficient to state that the said sum has not been paid. (*Hart* v. *Myerris*, Ex., 3 Tyrw. 238.

* An affidavit "for money found to be due on an account closed between them," is sufficient. (*Debenham* v. *Chambers*, M. T. 1827. Ex., 6 D. P. C. 101).

So, on the balance of an account stated, not adding, *and settled* between the plaintiff and defendant. (*Tyler* v. *Campbell*, E. T. 1837, C. P., 3 Bing. N. S. 675; S. C. 5 D. P. C. 632; S. C. 4 Scott, 384). So, without alleging that a balance was struck. (*Balmanno* v. *May*, H. T. 1838, Q. B., 6 D. P. C. 306.

But, merely describing the debt "on an account stated," insufficient. (*Hooper* v. *Vestris*, T. T. 1837; B. C., 5 D. P. C. 710).

† Where an affidavit stated, that the defendant is indebted to the plaintiff in the sum of 1000*l.*, upon and by virtue of a certain memorandum in writing, bearing date and signed by the defendant, whereby he promised plaintiff, that, when he returned in the month of March or April then next, he would marry her, or pay her the sum of 1000*l.* Held, insufficient; because it did not shew mutual consideration on the part of the plaintiff to sustain the defendant's promise. (*Macpherson* v. *Lovie*, 1 B. & C. 108; S. C. 2 D. & R. 69).

In *Walker* v. *Grogory*, H. T. 1831, K. B., 1 D. P. C. 24, the affidavit stated, that the defendant was indebted to the plaintiff in 2,063*l.*, secured to the latter by an indenture made between him and the deponent, by which he covenanted to pay the plaintiff 50*l.*, and the costs of executing the indenture, and the further sum of 2000*l.*, at certain times and on certain events which have now passed, and that such sums have not as yet been paid, is sufficiently explicit and certain. (See *Barnard* v. *Neville*, T. T. 1825, C. P., 3 Bing. 126; S. C. 10 Moore, 475. S. P., *Skeen* v. *M'Gregor*, E. T. 1823, C. P., 1 Bing. 242; S. C. 8 Moore, 107).

By vendor against purchaser, the terms of the contract must be disclosed: alleging the defendant to be indebted in respect of certain lands in his possession, is bad; (*Sykes* v. *Ross*, M. T. 1827, Ex., 2 Y. & J. 2; and such an affidavit should allege an actual tender of a conveyance. (*Young* v. *Dowlman*, M. T. 1827, Ex., 2 Y. & J. 31).

In an affidavit on a guarantee, the terms and the expressions of the credit must be disclosed. (*Angus* v. *Robilliard*, T. T. 1833, Ex., 2 D. P. C. 90; S. C. 9 Price, 159).

So, if an agreement contains a condition precedent, its performance must be stated in the affidavit; (*Elworthy* v. *Maunder*, M. T. 1828; C. P., 2 M. & P. 482; S. C., 5 Bing. 295); and shew that the principal has not been paid, and a specific sum shewn to be due arising from his default. (*Collins* v. *Wallis*, H. T. 1826; C. P., 11 Moore, 248).

(*l*) FOR DEBT ON BONDS AND MORTGAGE DEEDS *.

(*m*) FOR TORTS †.

## VII. BY AND AGAINST PARTICULAR PARTIES.

(*a*) IN ACTIONS BY PARTNERS ‡.

(*b*) IN ACTIONS BY ASSIGNEES OF BANKRUPTS AND INSOLVENTS §.

(*c*) IN ACTIONS BY EXECUTORS OR ADMINISTRATORS ‖.

(*d*) IN ACTIONS BY HUSBAND AND WIFE ¶.

(*e*) IN ACTIONS BY ASSIGNEES OF CHOSES IN ACTION **.

And where an affidavit is to recover a sum of money, to which deponent alleges he has rendered himself liable for the defendant, the affidavit must allege that the liability has been incurred. (*Townsend* v. *Burns*, E. T. 1832, Ex., 2 C. & J. 468; S. C. 1 D. P. C. 562).

* On a bond to pay a certain sum as liquidated damages, in the event of certain weekly instalments not being duly made, it is necessary to shew default in payment to the amount for which the affidavit purports to be made. (*Chambers* v. *Ward*, 1 D. P. C. 139). And that the debt is due and payable at the time of the arrest. (*Smith* v. *Kendal*, M. T. 1825, K. B., 7 D. & R. 232).

Stating the debt to be upon a deed, with a covenant to pay it with interest, on a day now past, suffices, without alleging it to be due and unpaid. (*Lambert* v. *Wray*, M. T. 1834, Ex., 1 M., C., & R. 576; S. C. 3 D. P. C. 169; S. C. 5 Tyrw. 195; *Masters* v. *Billing*, E. T. 1835, Ex., 3 D. P. C. 751).

† In an action on the case, it is sufficient for the plaintiff's attorney to swear to the amount of damages, according to his information and belief. (*Hodgson* v. *Dowell*, H. T. 1838, Ex., 6 D. P. C. 344; S. C. 3 M. & W. 284).

In trover, where a defendant has been arrested under a judge's order, the Court will not enter into the merits. (*Brackenbury* v. *Needham*, T. T. 1832; K. B., 1 D. P. C. 439).

‡ Affidavit for joint debt need not shew the parties to be copartners. (*Bodfield* v. *Padmore*, H. T. 1834; K. B., 5 B. & Ad. 1095).

§ Affidavit by assignees of a bankrupt stating that the defendant was indebted, as appears by the books of the bankrupt, and as the deponent verily believed, without alleging the books to be in the deponent's possession:—*Held*, sufficient. (*Hatten* v. *Bristow*, T. T. 1826, C. P., 11 Moore, 504; S. P. *Harrison* v. *Turner*, T. T. 1835, B. C., 4 D. P. C. 72); but not for them to swear merely to belief as to debt being unpaid to them as assignees. (*Tucker* v. *Francis*, E. T. 1827, C. P., 4 Bing. 142, S. C. 12 Moore, 847).

‖ Alleging debt to be due to the plaintiffs executors of —— and not *as* executors of ——, does not prevent the plaintiffs from afterwards declaring on the cause of action as in their own right. (*Anon.* T. T. 1831, K. B., 1 D. P. C. 97).

¶ Affidavit by husband and wife for money received to the use of the latter, is bad, unless it discloses when the money was received. (*Wade* v. *Wade*, M. T. 1826, C. P., 4 Bing. 50): it was also holden to be a fatal variance for the affidavit to describe a debt due to the husband, and for the process to be at the suit of the husband and wife. (Id.)

Affidavit for goods sold, &c. to the defendant's wife before her intermarriage, insufficient. (*Gray* v. *Shepherd*, H. T. 1835, Ex., 3 D. P. C. 442). But an affidavit that the defendant is indebted to the "husband and wife, administratrix," is sufficient. (*Coppin* v. *Potter*, H. T. 1834, C. P., 4 M. & Scott, 272).

** Where a bond has been assigned, the obligee need not swear that the obligor is indebted to him; it is sufficient to allege that the money is still unpaid; (*Fairman* v. *Farquharson*, H. T. 1828. C. P., 1 M. & P. 179; see *Byland* v. *King*, 1 Moore, 24; S. C. 7 Taunt. 275); but an assignee of a foreign debt must shew on the face of the affidavit that he is entitled as assignee to sue by the law of the country where the debt arose. (*Tenon* v. *Mars*, M. T. 1828, K. B., 3 M. & R. 39; S. C. 8 B. & C. 638; S. P. *Scuerhop* v. *Schmanuel*, 4 D. & R. 180).

VIII. FORMAL PARTS. See also *Affidavit, generally.*

(*a*) TITLE OF*.

(*b*) ADDITION AND DESCRIPTION OF DEPONENT†. See ante, tit. *Affidavit, generally,* where the Cases are abridged, and the Rule of Court stated.

(*c*) DESCRIPTION OF DEFENDANT‡.

(*d*) STATEMENT OF REQUEST §.

(*e*) JURAT. See tit. *Affidavit, generally.*

* The affidavit should regularly be intitled in the Court out of which the process is sued; (7 T. R. 451); but formerly not intitled in the cause; but now, if a summons is sued out before the application for a judge's order is made, it should be intitled in the cause. An affidavit, not intitled in any Court, if signed by the proper officer, suffices. (*Howell* v. *Wilkins*, M. T. 1828, K. B., 7 B. & C. 783; and *Urquhart* v. *Dick*, M. T. 1834, K. B., 3 D. P. C. 17).

When sworn before Court of Common Pleas and Exchequer in Ireland, it is no objection that the title of the Court was not prefixed to it at the time of its being sworn. (*Perse* v. *Browning*, E. T. 1836, Ex., 1 M. & W. 362).

† The affidavit, describing the deponent as J. S., in the county of Somerset, Esq., is sufficient. (*Coppin* v. *Potter*, H. T. 1834, C. P., 10 Bing. 441; S. C. 2 D. P. C. 785). So prisoner in the Fleet, (*Sharp* v. *Johnston*, M. T. 1835, C. P., 2 Bing. N. S. 246; S. C. 2 Scott, 405; S. C. 4 D. P. C. 324); or, as agent and collector to the plaintiff, an hotel keeper; (*Short* v. *Campbell*, H. T. 1835, Ex., 3 D. P. C. 487); or as clerk to plaintiff, describing himself as of the latter's place of business. (*Alexander* v. *Milton*, E. T. 1832, Ex., 1 D. P. C. 570; S. C. 2 C. & J. 424; S. C. 2 Tyrw. 495). But merely describing the deponent as "acting as managing clerk" to the plaintiff's attorney, is insufficient. (*Graves* v. *Browning*, E. T. 1837, K. B., 6 Ad. & E. 805). So an affidavit, "H., manager of the said bank, maketh oath and saith, that N. is justly and truly indebted to S., as one of the registered public officers of the said bank in £——. for money lent by this deponent as such manager as aforesaid to the said N., at his request," is irregular, under the 7 Geo. 4, c. 46, but not void. (*Spencer* v. *Newton*, E. T. 1837, K. B., 6 Ad. & E. 630, n.). The Court will not interfere to cancel the bail-bond, on the ground that the deponent's residence is incorrectly described, unless the applicant swears he does not owe the money, or know the plaintiff; (*Brown* v. *Moore*, E. T. 1827, C. P., 4 Bing. 148; S. C. 12 Moore, 361); though it has been so, the Court will not, under any circumstances, relax the rule, that the deponent, in an affidavit to hold to bail, should insert therein his true place of abode. (*Collins* v. *Goodyer*, 4 D. & R. 44; S. C. 2 B. & C. 563). Affidavit of debt by a foreigner is sufficiently verified as to its having been duly translated to deponent by a certificate from the deputy signer of the writs. (*Bosc* v. *Solliers*, T. T. 1825, K. B., 4 B. & C. 358; S. C. 6 D. & R. 514).

‡ Formerly, if defendant was described by initials of his Christian name only, or by a wrong name, the affidavit was bad; (4 B. & A. 536; 1 Chit. 397); but now, whenever the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. (H. T. 2 W. 4. *See post, tit.* "*Misnomer*)."

§ The cause of action must be alleged to have accrued at the defendant's request, or the circumstances disclosed must be such as to dispense with it. (*Smith* v. *Heap*, E. T. 1836, B. C., 5 D. P. C. 11; see 8 B. & C. 654; 11 Moore, 383; 2 Tyrw. 315); and R. H. T. 2 W. 4, expressly directs, that affidavits to hold to bail for money paid to the use of defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour done to have been done, at the request of the defendant. (See 5 M. & S. 226; 3 M. & R. 129; 8 B. & C. 654; 5 Taunt. 703; 1 Bing. 338; 1 D. P. C. 333). The allegetion of request at the end of the affidavit may be made applicable to the whole. (*Gale* v. *Leckie*, 6 M. & S. 228).

## IX. DURING WHAT TIME IT CONTINUES IN FORCE*.

## X. OF SUPPLEMENTAL AND CONTRADICTORY AFFIDAVITS†.

## XI. WHEN SAME AFFIDAVIT MAY BE USED A SECOND TIME, AND WHEN SECOND AFFIDAVIT REQUISITE‡.

## XII. WHEN AFFIDAVIT BAD AS TO PART, BAD AS TO WHOLE§.

* In general, it must not be made beyond a year prior to commencement of the suit. (*Taylor* v. *Slater*, H. T. 1836, C. P., 2 Scott, 839; S. P. *Ramsden* v. *Maugham*, M. T. 1835, Ex., 2 C., M., & R. 634; S. C. 1 Tyrw. & G. 40; S. C. 4 D. P. C. 403. *See* 1 D. P. C. 691; *Stewart* v. *Freeman*, 2 Stra. Rep. 1270; Petersdorff on Bail, 189); though where the defendant had, under a Judge's order, been arrested on an affidavit of debt made in 1831, it was objected, that the affidavit was not available from the lapse of time; but *Taunton*, J., seemed to consider, that, if the affidavit had been seen by the learned Judge who made the order, the order would be conclusive. (*Westmacott* v. *Cook*, E. T. 1834, K. B., 2 D. P. C. 519).

† An affidavit impeaching the debt cannot be received in opposition to the creditor's statement; (*Isaacs* v. *Silvester*, E T. 1826, C. P., 11 Moore, 348; S. P. *M'Ginnis* v. *M'Curling*, E. T. 1825, K. B., 6 D. & R. 24, overruling *Wightwick* v. *Banks*, Ex., Forr. 153); and, by 1 R. H. T. 2 Will. 4, no supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail. But where the affidavit alleged the debt to be due to the plaintiffs and their *late* copartner, a statement which was shewn to be untrue by the production of an affidavit, that the partner was still alive, the bail-bond was ordered to be cancelled. (*Morrell* v. *Parker*, M. T. 1837, Ex., 6 D. P. C. 123; S. C. 3 M. & W. 65). So, where a party is held to bail under a judge's order, upon an affidavit stating special facts, a counter-affidavit will be received on motion for the defendant's discharge. (*Hutt* v. *Capelin*, M. T. 1837, C. P., 5 Scott, 415).

‡ After the discontinuance of one action, the defendant may be arrested in a second suit for the same cause of action upon the same affidavit. (*Richards* v. *Stuart*, M. T. 1833, C. P., 10 Bing. 322; S. C. 3 M. & Scott, 778; S. C. 2 D. P. C. 754). And where a capias into Sussex was issued upon an affidavit filed with the filacer of that county, and returned non est inventus, it was holden, that an alias might be sued out by continuance into a different county in the same affidavit; (*Coppin* v. *Potter*, H. T. 1834, C. P., 10 Bing. 441; S. C. 4 M. & Scott, 272; S. C. 2 D. P. C. 785); but if there be *concurrent* writs of capias issued, there should be an affidavit of debt filed with the filacer of each county. (*Dunne* v. *Harding*, E. T. 1834, C. P., 4 M. & Scott, 450). Where the affidavit was filed on the 9th of April with the filacer for Surrey, and a capias issued into that county on the 7th of May, and in Michaelmas Term an alias thereon issued into Middlesex, without any fresh affidavit being filed, the same person officiating as filacer for Surrey and Middlesex:—The Court held the proceeding regular. (*Ramsden* v. *Maugham*, M. T. 1835, Ex., 2 C., M., & R. 634; S. C. 1 Tyrw. & G. 40; S. C. 4 D. P. C. 403). So, in a case where a process was issued on a good affidavit of debt, and afterwards another into another county upon a defective affidavit, on which the defendant was arrested, the arrest was esteemed regular, as the first affidavit, being sworn before the same officer who issued both writs, would warrant the issuing of the second writ without a fresh affidavit. (*Rock* v. *Johnson*, M. T. 1835, Ex., 4 D. P. C. 405). Where a bill of Middlesex was issued into another county, and a latitat into Surrey:—*Held*, that one affidavit of debt was sufficient. (*Baker* v. *Allen*, M. T. 1827, K. B., 7 B. & C. 526).

§ This rule seemed to be settled by a large class of cases; (*Kirk* v. *Almond*, H. T. 1832, Ex., 2 C. & J. 354; S. C. 2 Tyrw. 316; S. C. 1 D. P. C. 318; S. P. *Baker* v. *Wills*, M. T. 1832, 1 C. & M. 238; S. C. 3 Tyrw. 182; S. C. 1 D. P. C. 631; *Raggett* v. *Guy*, E. T. 1835, K. B., 3 D. P. C. 554; *Drake* v. *Harding*, T. T. 1835, B. C., 4 D. P. C. 34); but, in *Jones* v. *Collins*, (E. T. 1838, B. C., 6 D. P. C. 526), it was holden, that an affidavit stating two causes of action, one imperfectly and the other correctly, is not bad altogether; but the defendant may be held to bail for the latter, if separate and independent of the former.

## XIII. CONSEQUENCES OF THERE BEING NO AFFIDAVIT, OR AFFIDAVIT BEING DEFECTIVE*.

**Affirmation.** See post, tit. *Oaths*—as to *Quakers,* see 7 & 8 Will. 3, c. 34; 22 Geo. 2, c. 46, ss. 36, 37—as to *Moravians and Quakers,* see 3 & 4 Will. 4, c. 49—as to *Persons who formerly were Quakers or Moravians,* see 1 & 2 Vict. c. 77—as to *Separatists,* see Id. s. 2.

**Affirmative and Negative.** See tits. *Issue—Pleas Pleading.*

* When no affidavit has been made prior to the arrest or Judge's order, when necessary, obtained, or the affidavit is in any material respect defective, or not regularly delivered to the proper officer, the Court, upon application, will discharge defendant upon entering an appearance, or, in some instances, will order the bail-bond to be cancelled: the application for these purposes should be made within a reasonable time after the error has been committed; (8 T. R. 77; 1 East, 19); and not after putting in, (1 East, 334), or perfecting bail, (1 East, 81), or defendant rendered by his bail, (6 Taunt. 185), or after plea, (7 T. R. 376), or executing a writ of inquiry, (8 T. R. 77), or voluntarily giving a bail-bond, (7 T. R. 375), or render, (*Reeves* v. *Hucker,* M. T. 1831, Ex., 2 C. & J. 44; S. C. 2 Tyrw. 161), or after time for appearing or putting in bail has elapsed; (*Tucker* v. *Colegate,* 2 C. & J. 489; S C. 2 Tyrw. 496; 1 D. P. C. 574); and personal indisposition affords no ground for relaxing the strictness of the rule; (*Daley* v. *Mahon,* M. T. 1837, C. P., 4 Bing. N. S. 8; S. C. 6 D. P. C. 192; S. C. 5 Scott, 229; S. P. *Bradshaw* v. *Russell,* M. T. 1837, 5 Scott, 268); nor will the Court interfere where it would be necessary, in order to determine whether affidavit sufficient, to investigate the merits of the cause of action itself. (*Burton* v. *Haworth,* H. T. 1833, K. B., 4 B. & Ad. 462). When the arrest was on the 22nd May, and the sheriff had been ruled to return the writ:—Held too late to object to the sufficiency of the affidavit on the 7th of June. (*Firley* v. *Rallett,* T. T. 1834, Ex., 2 D. P. C. 708). So, where the arrest was on the 26th October, held it was too late to apply on the 14th of November. (*Fowell* v. *Petre,* M. T. 1836, K. B., 5 A. & E. 818; S. C. 1 N. & P. 227). So, it is too late where there were fourteen days in term, and the defendant's application was made three days after term; (*Spencer* v. *Newton,* H. T. 1837, K. B., 1 N. & P. 823); but where the plaintiff agreed to accept bail offered by the defendant, and he was let out of custody with the former's consent, the Court held he had waived any objection as to the original affidavit of debt. (*Mammatt* v. *Mathew,* E. T. 1834, C. P. 10 Bing. 506; S. C. 1 Scott, 356; S. C. 2 D. P. C. 797). A mistake in a subsequent part of an affidavit, not varying substantially a prior statement, will not be deemed such a defect as to induce the Court to interfere. (*Noel* v. *Williams,* E. T. 1832, Ex., 2 Tyrw. 388; S. C. 1 D. P. C. 558; S. C. 2 C. & J. 379).

A variance between the cause of action relied on and that stated in the affidavit cannot be taken advantage of before the declaration is filed: (*Naylor* v. *Eagar,* H. T. 1828, Ex., 2 Y. & J. 90); but the omission of an indorsement between the first indorsee and the plaintiff is no variance from a declaration which states such indorsement. (*Luce* v. *Irvin,* M. T. 1837, Ex., 6 D. P. C. 92; S. C. 3 M. & W. 27). An affidavit to hold to bail was made before the British Consul at Cadiz, in which the plaintiff swore that the defendant was indebted to him in the sum of 100,000*l.* sterling. The Court held, that the word "sterling" rendered the affidavit uncertain, and discharged the defendant on filing common bail. (*Pickardo* v. *Machado,* M. T., 1825, K. B.; 4 B. & C. 886; S. C. 7 D. & R. 478). Where the *writ* is not *set aside,* an action of trespass for false imprisonment cannot be sustained, on the ground that the affidavit was defective. (*Reddell* v. *Pakeman,* E. T. 1835, Ex., 3 D. P. C. 714; 2 C., M., & R., 30).

**Affray***. See tits. *Assault and Battery—Assembly, Unlawful—Riot.*

**Age.** See tits. *Infant—Marriage.*

**Agent.** See tits. *Attorney—Principal and Agent.*

**Agistment.** See tits. *Bailment—Lien—Set-off—Tithes.*

**Agreement.** See tit. *Contract, (titles according to subject-matter).*

**Alderman.** See tit. *Corporations.*

## Alehouse and Beer-Shops.

(1 *Peters. Ab.* 443).

See tit. *Innkeepers*—as to *Alehouses,* see 9 Geo. 4, c. 51—as to *Beer-Shops,* 1 Will. 4, c. 64, extended by 4 & 5 Will. 4, c. 89.

REX *v.* JUSTICES OF SURREY, M. T. 1824. K. B. 5 *D. & R.* 308.

The 26 Geo. 3, c. 31, s. 4, and 3 Geo. 4, c. 77, s. 7, only authorize the licensing of alehouses in cities and towns during the month of September†.

BY the 26 Geo. 2, c. 31, s. 4, it is enacted, that no license shall be granted but on the 1st of September yearly, or within twenty days after; and that such license shall be made for one year only, to commence on the 29th of September; and, by s. 16, there is an exemption of cities and towns corporate as to the time of granting licenses.

By 3 Geo. 4, c. 77, s. 7, all general annual meetings for granting licenses, as well in cities and towns corporate as in all other places in England, shall be held in the month of September yearly. On motion against justices to re-hear an appeal for an alehouse license—

*Per Cur.*—The licenses must be granted during the month of September; the 4th section of the 26 Geo. 2, c. 31, is not repealed by the 3 Geo. 4, c. 77, s. 7. By the 16th section of the first-mentioned statute, there was an exception as to cities and towns cor-

* Without a warrant, a constable has no right to apprehend a party who has been engaged in an affray when the affray is over. (*Cook* v. *Nethercote,* H. T. 1835, N. P., 6 C. & P. 741; S. P. 1 Hawk. c. 63, s. 17).

But, it appears, he may take those who have been engaged in the affray before a justice, when they may have been arrested by other persons present, and who are delivered over by such persons into his custody. (See *Reg.* v. *Tooley,* 2 Ld. Raym. 1296; *Clifford* v. *Brandon,* 2 Campb. 367; see *Williams* v. *Glennister,* 2 B. & C. 699; S. C. 4 D. & R. 217; 1 Hawk. c. 63).

† As to agreement to transfer licenses, see *Bryant* v. *Beattie,* 4 Bing. N. S. 254; S. C. 5 Scott, 751; *post, tit.* "*Innkeeper.*"

porate. The object of the 7th section of the 3 Geo. 4, c. 77, is to extend the general provisions of the 26 Geo. 2, so as to apply to cities and towns corporate.

*See Rex* v. *Drake*, 6 *M. & S.* 116; 7 *Geo.* 4, *c.* 61, *s.* 58.

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BROOKER *v.* WOOD, H. T. 1834. K. B. 3 *N. & M.* 96, *overruling* MEUX *v.* HUMPHRIES, M. T. 1828. N. P. 3 *C. & P.* 79.

The price of beer sold to a party who carries on the business of an alehouse-keeper, through the agency and in the name of another, and in whose name the house is licensed, may be recovered against the former.

ACTION for price of beer supplied to defendant. It appeared, that the business was conducted by his daughter, who alone resided at the house; and the license from the magistrates to sell beer was in her name. The defence was, that the daughter was liable, and that credit was not given to the defendant; and it was objected, on defendant's part, that, assuming the credit was given to him, the plaintiff could not recover, as the contract would be a fraud on the revenue law.

*Per Cur.*—In *Meux* v. *Humphries*, Lord *Tenterden* thought that the brewers could not charge any one as their debtor in the first instance, except the person who was licensed to keep the public-house; but, upon considering this question very fully, we are of opinion that this is not so. We think this cannot be considered a fraud on the licensing system, because the liability must depend on the fact to whom credit was given.

*See* 5 *M. & R.* 114; *S. C.* 10 *B. & C.* 93; 3 *B. & Ad.* 221; 3 *N. & M.* 244.

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MAYOR OF LEICESTER, *v.* BURGESS, T. T. 1833. K. B. 2 *N. & M.* 131; S. C. 5 *B. & Ad.* 246.

The particular custom of a borough, that no alehouse-keeper shall carry on that business, unless he be a burgess, is not affected by the stat. 11 Geo. 4 & 1 Will. 4, c. 64.

DECLARATION stated, that there had been, from time whereof &c., an ancient custom in the borough, that no person, not being a burgess, or the widow of a burgess, of the borough aforesaid, shall carry on the trade of an alehouse-keeper within the limits of the borough. Breach—that the defendant was not a burgess of the borough, and did carry on the trade of an alehouse-keeper within the borough. On demurrer, the question raised was, whether the act of 1 Will. 4, c. 64, which authorizes the general sale of beer by retail, supersedes the local customs of particular places.

*Per Cur.*—The object of the act was to give the public at large a power of selling beer. Under the former acts, no power was given to the magistrates to grant licenses to sell beer in places where a local custom as to the granting of licenses existed; therefore, we think that this act, which merely extends the class of persons qualified to demand a license, does not empower the granting of licenses to sell within a borough where a local custom as to the retailing of beer exists.

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NEWMAN *v.* EARL OF HARDWICKE, E. T. 1838. K. B. 8 *A. & E.* 124.

A conviction for selling beer out of the prescribed hours must state what those hours

A CONVICTION, under 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, set forth, that the plaintiff was convicted by the defendant acting in petty sessions; for that the said plaintiff being a seller of beer, ale and porter, cider and perry, by retail, and licensed to sell the same by retail, to be drunk on the premises, under the

were, and at what time they were violated.

provision of the statutes in that case made and provided, did, on &c., at a time declared to be unlawful by an order of the justices of the peace for the said county, acting in and for the division of A., permit beer to be drunk and consumed in the house and premises mentioned in such license, and situate in &c., against the tenor of such license, granted to the said plaintiff under the provisions of the said statutes, and contrary to the form of the said statutes. In trespass against the defendants, justices of the peace,

*Per Cur.*—By the act for permitting the sale of beer by retail, the justices are required yearly, in petty sessions, to fix the hours at which the beer-houses shall be opened and closed. This conviction contains no statement that any such order in petty sessions was made, nor does it state at what hour the house of the plaintiff was kept open. We are, therefore, of opinion, that, as time is so much matter of substance in this offence, the conviction is bad for want of such statement.

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REX *v.* JUSTICES OF MIDDLESEX, T.T. 1832. K. B. 3 *B. & Ad.* 938.

The parties aggrieved within the meaning of the appeal clause in 9 Geo. 4, c. 51, s. 27, are those only who are immediately aggrieved by the act done, and not merely consequentially injured.

THE 9 Geo. 4, c. 61, s. 27, for regulating the granting of licenses to inn-keepers, &c., enacts, that "any person who shall think himself aggrieved by any act of any justices in execution of that act, may appeal against such act to the Quarter Sessions." The justices having granted a license to A. B. to open a public house not before licensed, within a short distance of C. D.'s, a licensed public-house, C. D. appealed against such grant of the license to A. B.

But the Court held, that the words "person who shall think himself aggrieved," means a person immediately aggrieved, as by a refusal of a license to himself, and not a person like the present appellant, who is merely consequentially injured.

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REG. *v.* JUSTICES OF CHESHIRE, H. T. 1840. Q. B. 3 *P. & D.* 23 n.

All the justices who have convicted under the 9 Geo. 4, c. 61, must have notice of the appeal against their conviction.

A. B. had been convicted under the 9 Geo. 4, c. 61, the Alehouse Act, in a penalty of 40*s.*, at a petty sessions, by C. and D., justices. A. B. appealed against the conviction, and gave notice of appeal to the chairman only, C. At the trial, at the Quarter Sessions, it was objected, that notice of appeal should have been given to the other convicting justice; and the Sessions dismissed the appeal.

On motion for a mandamus to compel them to hear the appeal, the Court decided, upon the authority of the case of *The Queen* v. *Justices of Bedfordshire*, (3 P. & D. 21), that the notice of appeal must be given to all the convicting justices.

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**Alias.** See tits. *Capias, Writ of—Fieri Facias—Capias ad Satisfaciendum.*

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**Alias Dictus.** See tit. *Judgment.*

# Aliens*.

I. WHO ARE ALIENS, p. 149.
II. RIGHTS AND DISABILITIES OF, p. 151.
III. STATUTE 6 WILL. 4, c. 11, RELATING TO, p. 152.

## I. WHO ARE ALIENS.

### Auchmuty *v.* Mulcaster, T.T. 1826. K.B. 5 *B. & C.* 771; S.C. 8 *D. & R.* 593.

The children of a subject, who

In ejectment, it appeared, that the parent, at the treaty of 1783 recognising the independence of America, adhered to his then

* The term alien signifies a person born out of the allegiance of the sovereign. If, therefore, a foreign enemy be resident in this country, and have issue born within the realm, his offspring would be alien; because not born under her Majesty's protection, or under an acknowledgment of her supremacy. A party born in a district not actually possessed by the King at the period of his birth, but which is obtained by treaty or conquest subsequent to his nativity, continues an alien, notwithstanding the political change or substitution of one dynasty for another.

An alien enemy is a person acknowledging an allegiance to a state engaged in actual hostilities with this country. The war which converts an alien friend into a foreign enemy, is that species of conflict between nations which is undertaken and prosecuted by the constituted authorities.

To legalize hostilities, they must not only be commenced or declared by one of the belligerent states, but such commencement or declaration must be made by that particular branch of the government which is invested by the constitution with this important prerogative. In England, the right of declaring war or making peace is vested exclusively in the sovereign. To ascertain whether or not a state of war, or a state of amity or neutrality, prevails, it was observed by Sir *William Grant*, that it always belongs to the government of the country to determine in what relations any other nation or state stands towards it. It is a point upon which courts of justice cannot decide. A proclamation in the Gazette for reprisals is evidence of hostilities. (4 M. & S. 532). So, a recital of the existence of warfare in an act of parliament is evidence of the fact. (2 Campb. 44). So, an order in council, declaring certain ports not hostile, which had formerly been so, is conclusive evidence that hostilities no longer prevail; (3 Campb. 61); but with respect to a war between this country and another power, it has been decided, that public notoriety is sufficient proof of the existence of such hostilities, and that special evidence of the fact need not be adduced. (11 Ves. 292).

*With respect to the Rights and Incapacities of Aliens*,—some discrimination between citizens and foreigners, as to their rights and obligations, has prevailed in the laws of most civilized states. In England, it has been thought inconsistent with the safety and interests of the country that aliens should hold real property —a phrase used to denote things permanent, fixed, and immovable, as houses and lands. This apparently harsh exclusion from enjoying the profits of the soil is founded upon solid reasoning and political experience. If an alien could acquire a permanent property in lands, he must acknowledge an allegiance, equally permanent with that property, to the King of England—a permanent allegiance which would be inconsistent with that which he owes to his own natural sovereign. "If," says Lord *Coke*, (Co. Lit. 206), "an alien purchase lands to him and his heirs, he is of capacity to take a fee-simple, that is, to become a purchaser, but not to retain; for, after the holding of a proper inquisition, the king shall have the estate by his prerogative by whomsoever the land may be possessed." So, if an alien purchase land and die, the law casts the freehold and inheritance upon his Majesty. So it is the rule, if land be devised to an alien; but the estate purchased by or devised to an alien does not vest in the Crown immediately. An inquest of office must be holden, and a jury must

has not disclaimed allegiance, though resident in a colony which has declared itself independent of the parent state, are not aliens*.

Majesty, and returned as a loyalist to this country, though he afterwards went to reside in America, where he married and settled, during which time the children, through whom the lessors of the plaintiff claimed, *were born*. It was contended, that the lessors of the plaintiff are not capable of inheriting lands in this country: they were born in the United States of America, after the independence of those states had been recognised; and being born of parents settled there, must be considered aliens. In *Calvin's case*, an alien is defined to be a subject that is born out of the legiance of the King, and under the legiance of another, and his definition is adopted in Com. Dig. Alien, (A.).

*Sed per Cur.*—It is true the parent of the lessors of the plaintiff did not throw off his allegiance at the time of the treaty, and the

find him an alien. Until such judicial inquiry has been instituted, and the result recorded, the alien continues legal proprietor, and he may maintain an action for injuries committed to the property by a wrongdoer. The exercise of the prerogative of the Crown, to the prejudice of the alien's relatives, is of rare occurrence. The practice is, for his Majesty, on a petition being presented to the Commissioners of the Treasury, disclosing the facts, to grant the lands to the parties, who might otherwise be deprived of them, and to direct the execution of the necessary trusts to which the property is to be liable. The adoption of this course of proceeding is sanctioned and confirmed by an express declaration in the 47 Geo. 3, c. 24. Although an alien may take real property by purchase, that is, by an act of his own; yet he cannot derive title to it by descent, by dower, or by the curtesy of England; such interests are transmitted by acts of law. "The act of law," observes the learned commentator upon Littleton, "giveth the alien nothing." Hence, even at the present day, an alien is excluded, not only from strictly holding what real estate he has acquired by purchase, but from even taking by descent, or acquiring a title to dower, or as tenant by the curtesy. The reason of this distinction between the acts of the alien himself, by which he may take but cannot hold, and the act of law, by which he cannot even take, is, that the law will not confer a mere nominal right, the possession of which cannot be permanently secured.

*An alien friend*, during his residence here, is in every sense subject to, and protected by, the municipal law. He may sue for any individual injury or the violation of any personal contract, in the same manner as a natural-born subject. Foreigners are entitled to equal justice, but not to greater indulgence in our courts than a subject. Hence, the Statute of Limitations does not operate against the claim of an alien creditor until he has been in this realm. Aliens are amenable to, and benefit by, the statutes concerning bankrupts. They may be trustees, executors, or administrators. They may, in a representative capacity, hold leases as well as take mere personal property, whether they reside here or in a foreign country. The property of an alien resident abroad, consisting of money in the public funds, or other personal effects in England, is subject to the control of the Court of Chancery. And, if an alien resident abroad die intestate, his whole property here is distributable according to the law of the country where he resided; but such residence must have been stationary and not temporary, otherwise the foreign municipal regulations will not attach upon the property.

Aliens have always been eligible to hold any superior ecclesiastical appointment; but an alien cannot be appointed to, or entrusted with, any office connected with the administration of justice, not even the office of constable, much less is he qualified to vote at parliamentary elections, or to be chosen a member of the legislature.

As an alien while he resides here is generally subject to our laws, and owes a local and temporary allegiance to our sovereign, he may be guilty of high treason. When tried for this offence, he cannot demand the privilege of having a jury consisting of an equal number of foreigners and natural-born subjects, to which he is entitled on other criminal charges.

* And in *Sutton* v. *Sutton*, 1 Russ. & M. 663, it was decided, upon a question of title, that in favour of it the heirs and assigns of every American, who held lands in Great Britain at the period stated in the 37 Geo. 3, are, as far as regards those lands, to be treated, not as aliens, but as native subjects.

A person born in America, after the treaty of 1783, is an alien, and incapable of holding lands by descent in England. (*Doe* d. *Thomas* v. *Acklam*, E. T. 1824,

law did not enable him to do so at any future time. He was therefore, when residing in America after the treaty, in the same situation as if he had gone to reside in any other foreign country; and his children are expressly within the statute 4 G. 2, c. 21, and entitled to the privileges of natural-born subjects of the King of England.

## II. RIGHTS AND DISABILITIES OF.

PISANI *v.* LAWSON, M. T. 1839. C. P. 8 *Scott*, 128; S. C. 6 *Bing. N. S.* 90; 8 *D. P. C.* 57.

An alien friend may sustain a personal action, though he has never been in England*;

DECLARATION for a libel. Plea,—that the plaintiff was an alien born at the time of committing the alleged grievance, and still residing out of the kingdom; that he was never naturalized, domiciled, or made a denizen, or in obedience or subject to the Queen, or to any of the sovereigns of these realms, or subject to the laws and customs of the United Kingdom; that he never used or exercised, and does not now use or exercise, trade as a merchant into or from any part of the said kingdom; and that he is not now in the allegiance of the Queen, or in any manner subject to our laws.

The Court held the plea to be bad, and no answer to the action; inasmuch as it is competent to an alien, not an enemy, to maintain a personal action; and it is immaterial whether he has been within the realm or not.

*See* 1 *Dy.* 2 *b;* 1 *Bulst.* 134; *S. C. Yelv.* 198.

K. B., 2 B. & C. 779; S. C. 4 D. & R. 394). Hence, where a person in England died intestate, seised of lands in England; the grand-daughter of her uncle claimed to be her heir at law; that uncle went to America before 1783, and continued to live there until the time of his death; his daughter, the mother of the claimant, was born in America, and married in America in 1781; the claimant was born in America since the year 1783:—The Court held, that, by the treaty in 1783, the Americans were absolved from their allegiance to the sovereign of Great Britain; and that the claimant was an alien, and consequently not the heir at law of the intestate. (*Doe* d. *Sherwin* v. *Acklam*, 2 B. & C. 779; S. C. 4 D. & R. 394).

Where an alien obtained letters of denization, in terms enabling him not only to acquire but retain lands:—Held, that he acquired the right of devising freehold and chattel interests in lands purchased previously to obtaining the letters of denization; and having by his will directed all his property to be converted into money, and charged the mixed fund with debts and legacies, the residue he devised to aliens residing abroad, one of whom was his heir at law. Held, also, that, as to such residuary interest in the produce of the land, it belonged to the Crown, and in that of the personal estate to such aliens. (*Fourdien* v. *Gowding*, 3 M. & K. (Ch). 381).

A. resided in Pennsylvania, before the declaration of American independence, and he had a son, B., born there also before that period. In 1783, A. came to England to get compensation for his losses as an American loyalist. In 1785, he returned to Pennsylvania, where he died. B. never was in England:—*Semble*, that both A. and B. were American subjects, and that A. became so by returning to Pennsylvania in 1785; and that a claim to lands could only, (if at all), be made through them, under the stat. 37 Geo. 3, c. 97, s. 24. (*Doe* d. *Stansbury* v. *Arkwright*, 1833, N. P., 5 C. & P. 575).

* In Bro. Ab., tit. "*Non-ability*," pl. 62, it is said, "That it was held in Banco Regis, that a plea of alien born was no plea in personal actions; contrà in actions real." And in Viner's Ab., tit. "*Alien*," it is laid down, "That alien born is no plea, except in actions real and mixed; for, by the intercourse of all the world, merchants (aliens) may merchandize and bargain goods; therefore, ex æquitate, they ought to have actions for their debts and goods. A similar principle is to be extracted from Bro. Abr., tit. "*Denizen*," pl. 10; and Com. Dig., tit. "*Alien*." As to relieving bail when alien is sent out of the country, see *Postell* v. *Williams*, 7 T. R. 517; *Merrick* v. *Vaucher*, 6 T. R. 50.

OGDEN *v.* PEELE, E. T. 1826. K. B. 8 *D. & R.* 1.

but an alien enemy cannot sustain an action upon a contract made during the period of hostilities.

A., an American, and B., an English subject, were mutually trading before the year 1812, in which year war was declared, and continued until March, 1814, prior to which latter period A. consigned goods to B. in England, who, on arrival, shipped them to France, and sold them, and received bills on account of the proceeds, which he procured to be discounted. A second cargo arrived after that date, and was also sold by B. prior to the 15th of February, 1815; shortly after which he became bankrupt, and was appointed by his assignees their agent to wind up the affairs; in the course of which he received the proceeds of the second cargo, and transmitted accounts to A., in which he admitted A. to be his creditor for a balance in respect of the proceeds of the two cargoes.

The Court held, that A., being an alien enemy at the time of the first consignment, was only entitled to prove under B.'s commission in respect of the second consignment, as he could have maintained no action.

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LAPIERRE *v.* M'INTOSH, H. T. 1839. K. B. 9 *Ad. & E.* 857; 1 *P. & D.* 629.

An agreement for a lease to an alien artificer, is void by the 32 H. 8, c. 16, s. 12, as much as an actual demise*.

ACTION of trespass for breaking and entering the plaintiff's house. Plea—that the plaintiff was an alien artificer; that the plaintiff and defendant had agreed for the letting of the house to the plaintiff, and the granting of a lease thereof to him; and that the plaintiff entered into possession with a view of carrying the agreement into execution, but that the defendant entered to demand possession. On demurrer—

*Per Cur.*—It makes no difference whether this be a lease, or only an agreement for a lease; and, if the latter, whether enough has been done to determine the tenancy at will is immaterial; no other interest passed than a tenancy at will, which was determined by the defendant's entry; and the plaintiff had no right of action, being an alien.

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## III. STATUTES RELATING TO†.

* A demise of lands was made to English subjects, in trust to sell, and, after payment of mortgages, to invest the surplus monies in the funds, in trust for persons, some of whom were aliens:—Held, that the Crown was not entitled to the share of the aliens, either in the land or the produce. (*De Hourmelin* v. *Sheldon*, 1 Beav. 79).

A foreign prince who comes voluntarily as a suitor into a court of law in England, becomes subject, in all matters connected with that suit, to the jurisdiction of a court of equity. (*Rothschild* v. *Queen of Portugal*, 3 You. & C. 594).

It is no excuse in an alien, that the act charged against him is not an offence in his native country. (*Bosanquet*, J., and *Vaughan*, J.—*Rex* v. *Esop*, 1836, N. P., 7 C. & P. 456).

† The stat. 6 Will. 4, c. 11, (which repeals the 7 Geo. 4, c. 54), is the only statute now in force respecting aliens. Sect. 2 provides, that the master of every vessel which shall arrive in this realm from foreign parts shall, immediately upon his arrival, "declare in writing to the chief officer of the customs at the port of arrival, whether there is, to the best of his knowledge, any alien on board his vessel, and whether any alien hath to his knowledge landed therefrom at any place within this realm;" and shall in his said declaration specify the number of aliens (if any) on board his vessel, or who have to his knowledge landed therefrom, and their names, rank, occupation, and description, as far as he shall be informed thereof; and if such master shall refuse or neglect to make such declaration, or make a false one, he shall forfeit 20*l.*, and also 10*l.* for each alien on

board at the time of such vessel's arrival, or who to his knowledge landed therefrom within this realm, whom such master shall have wilfully refused or neglected to declare. (6 Will. 4, c. 11, s. 2). If such master neglect or refuse forthwith to pay the penalty, any officer of the customs may detain the vessel until the same be paid. (Id.) The section, however, does not extend to mariners actually employed in the navigation of such vessel during the time they are so employed. (Id.). If such declaration be made, the chief officer of the customs at the port shall, within two days, transmit a copy of it to one of the secretaries of state. (Id. s. 5).

*Alien to produce Passport and make Declaration.*—Every alien who shall arrive in any part of the United Kingdom from foreign parts, shall, immediately after such arrival, present and shew to the chief officer of the customs at the port of debarkation, for his inspection, any passport which may be in his possession, and declare in writing to such chief officer, or verbally make to him a declaration, to be by him reduced into writing, of the day and place of his landing, and of his name, and shall also declare to what country he belongs and is subject, and the country and place from whence he shall then have come. And if any such alien shall neglect or refuse to present and shew any passport which may be in his possession, or to make such declaration, he shall forfeit the sum of 2*l.* (6 Will. 4, c. 11, s. 3).

Upon the passport being produced, and the declaration made, the officer of the customs shall register the declaration, and grant the alien a certificate, (6 Will. 4, c. 11, s. 4), without fee, under a penalty of 20*l.*; (Id. s. 8); a copy of which certificate he shall transmit to one of the Secretaries of State. (Id. s. 5). And if any certificate so issued to an alien "shall be lost, mislaid, or destroyed, and such alien shall produce to one of his Majesty's justices of the peace proof thereof, and shall make it appear to the satisfaction of such justice that he or she hath duly conformed with this act, it shall be lawful for such justice, and he is hereby required, to certify the same under his hand;" and such alien shall thereupon be entitled to receive a fresh certificate from the Secretary of State. (Id. s. 7). On quitting the realm, the alien shall deliver the certificate to the officer of the customs, who shall insert therein that the alien has departed the realm, and shall transmit the same to the Secretary of State. (Id. s. 6).

*Making false Declarations, forging Certificates, &c.*—"If any person shall wilfully make or transmit any false declaration, or shall wilfully forge, counterfeit, or alter, or cause to be forged, counterfeited, or altered, or shall utter, knowing the same to be forged, counterfeited, or altered, any declaration or certificate hereby directed, or shall obtain any such certificate under any other name or description than the true name and description of the alien intended to be named and described, without disclosing to the person granting such certificate the true name and description of such alien, or shall falsely pretend to be the person intended to be named and described in any such certificate;" penalty not exceeding 100*l.*, or imprisonment for not more than three calendar months, at the discretion of the justices. (6 Will. 4, c. 11, s. 9).

*Proceedings to recover Penalties.*—All offences against this act shall be prosecuted within six calendar months after the offence committed; and all such offences shall be prosecuted before two or more justices of the peace of the place where the offence shall be committed; who are required, in default of payment of any pecuniary penalty, to commit the offender to the common gaol for any time not exceeding one calendar month, unless the penalty shall be sooner paid; and forthwith to report to one of his Majesty's principal Secretaries of State the conviction of every offender under this act, and the punishment to which he is adjudged: no writ of certiorari shall be allowed to remove the proceedings. (6 Will. 4, c. 11, s. 15).

By sect. 11, 6 Will. 4, c. 11, it is provided, that nothing in it contained shall affect any foreign ambassador or other public minister duly authorized, nor the domestic servant of any such ambassador or minister, registered as such according to law or being actually attendant upon such ambassador or minister; nor any alien who shall have been residing here three years, and shall have obtained a certificate thereof from one of the Secretaries of State; nor any alien under fourteen years of age, in respect of any act done or omitted by him. And it is also provided, that if any question shall arise, whether any person alleged to be an alien, and to be subject to the provisions of this act, be an alien or not, or is or is not subject to the said provisions, or any of them, the proof that such person is a natural-born subject, or a denizen or naturalized, or that such person (if an alien) is not subject to the provisions of this act by reason of any exception in the act or otherwise, shall lie upon the person so alleged to be an alien and subject to the provisions of this act.

**Allubion***.

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**Allocatur of Master or Prothonotary.** See tits. *Attorney—Costs.*

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**Allotment.** See tits. *Common—Inclosure.*

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**Alms-Houses.** See tit. *Poor Rate.*

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**Alteration.** See tits. *Amendment—Bills of Exchange and Promissory Notes—Bond—Contract—Insurances—Stamp.*

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## Ambassador†.

FISHER *v.* BEGREZ, M. T. 1833. Ex. 2 *C. & M.* 240; S. C. 3 *Tyrw.* 184; S. C. 2 *D. P. C.* 279.

Exemption from arrest on the part of an ambassador's servant is the privilege of the

THIS was a motion for setting aside a ca. sa., and made on behalf of the defendant, on an affidavit, stating that he was the first singer in the Bavarian chapel, and sung solos; that it was his duty to attend there on Sundays and Good Fridays; that he had for the last fourteen years been constantly in the service of his Excellency; that

* Lands gained gradually and imperceptibly from the sea belong to the owner of the adjoining demesne lands, and not to the crown. (1 Dow, N. S. 178; S. C. 5 Bing. 72; see tit. "*Sea Shore*").

† An ambassador, or his domestic servant, cannot be arrested or imprisoned, or his or their goods or chattels distrained, seized, or attached, (7 Anne, c. 18, s. 3), unless the party be a trader within the statutes concerning bankrupts.

Where an ambassador's servant is arrested, and an application is made to discharge him, the affidavit must be such as to satisfy the Court that he is a domestic servant of the ambassador, not collusively appointed for the purpose of the privilege; (*Lockwood* v. *Coysgarne*, 3 Burr. 1676; *Toms* v. *Hammond*, Barnes, 370; *Masters* v. *Manby*, 1 Burr. 401; *Darling* v. *Atkins*, 3 Wils. 33); but bonâ fide, and acting as such domestic; and for this purpose he must shew the nature of his office or service, the duties he is required to perform, and that he is in the habit of executing them. (*Wigmore* v. *Alvarez*, Fitz. 200; *Ball* v. *Fitzgerald*, Barnard 401; *Triquet* v. *Bath*, 3 Burr. 1478). It is not necessary that he should be actually a menial servant; (*Wigmore* v. *Alvarez*, Fitz. 200); but he must be bonâ fide a domestic. (See *Novello* v. *Toogood*, 2 D. & R. 833; S. C. 1 B. & C. 554; *Fisher* v. *Begrez*, 2 D. P. C. 279). His secretary is within this act; (*Hopkins* v. *De Robeck*, 3 T. R. 79); but consuls, who are deemed merely commercial agents, are not. (*Viveash* v. *Becker*, 3 M. & S. 284; Petersdorff on Bail, 52).

An affidavit made by a secretary to a foreign ambassador, who had been arrested jointly with his wife for a debt contracted by her whilst sole, "that he, before and at the time of the arrest, was in the actual employment of the ambassador, and in daily attendance upon him, writing despatches and other official documents and communications:"—Held insufficient, inasmuch as it does not state that he was a domestic servant, nor does it state anything to shew that he was within the reason of the privilege when he was first employed, &c. (2 D. P. C. 279; 1 B. & C. 554; 1 D. P. C. 588).

he received 30*l.* a year for his services; that he was paid by quarterly payments by the secretary to his Excellency; that he was bound to attend whenever he was called on to do so; and that he believed no other person was competent to sing the solos.

former, not of the latter;

*Per Cur.*—It must be remembered, the privilege is that of the ambassador, and not of the servant. The application is not made here on behalf of the ambassador, or of any one connected with him, but on behalf of the defendant alone; although he says that he is liable to be called on at any time, he does not shew that he has ever actually been called upon by the ambassador to perform any services. We are satisfied, from the affidavits on the part of the plaintiff, that the service is colourable only.

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ENGLISH *v.* CABALLERO, E. T. 1822. K. B. 3 *D. & R.* 25.

and the affidavit must state that he was a domestic servant, and shew that he was within the reason of the privilege.

UPON an affidavit made by a secretary to a foreign ambassador, who had been arrested jointly with his wife for a debt contracted by her whilst sole, "that he, before and at the time of the arrest, was in the actual employment of the ambassador, and in daily attendance upon him, writing despatches and other official documents andcommunications;"—the Court held it insufficient, inasmuch as it did not state that he was a domestic servant, nor did it state anything to shew that he was within the reason of the privilege when he was first employed, &c.

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FISHER *v.* BEGREZ, M. T. 1832. Ex. 1 *C. & M.* 117; S. C. 3 *Tyrw.* 184; 1 *D. P. C.* 588.

The Court will not quash a writ of fi. fa. against the supposed servant of an ambassador on the application of the sheriff, except upon very distinct and explicit evidence of the party being privileged.

THIS was an application on the part of the sheriff to quash a writ of fi. fa. The affidavit of the sheriff's officer stated; that, after he had received the writ, he found that the defendant's name was in the list of privileged persons returned by the Secretary of State, and put up in the sheriff's office; that no indemnity has been given; that the defendant is not a trader; that he is bonâ fide attached to the Bavarian chapel; and that he acts as chorister in the Bavarian chapel, and is in the suite of the Bavarian ambassador.

*Per Cur.*—The sheriff applies here on the ground of process being directed against a domestic servant of an ambassador whose goods are about to be seized; he desires, in fact, to be absolved from returning all process of this nature; and if he shews sufficient to satisfy the Court, they ought to do so, no doubt they would. But if there is not sufficient, the sheriff must make his return. Why does the sheriff ask to have the writ quashed? The statute speaks of ambassadors and domestic servants; but the name must also be in a list in the sheriff's office to make the sheriff answerable. That comes in by way of proviso, when it appears the sheriff would do wrong in executing the writ; that is, as to ambassadors and domestic servants: but he must satisfy the Court that the defendant is a domestic servant.

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THE ATTORNEY-GENERAL *v.* THORNTON, M. T. 1824. Ex. *M'Clel.* 600.

The privilege of the foreign ambassador with respect to duty on exciseable

UPON an information founded on the Customs Act, 57 Geo. 3, c. 52, it appeared, that a foreign ambassador, on retiring from office in this country, left a quantity of foreign wines and other customable goods, which had been imported in the usual manner, duty free, as

articles does not apply where he has left England, and placed them in the hands of an agent.

for his own use, by license from the treasury, with H., his agent, for sale. H. employed T., a sworn broker, for that purpose, who sold them by public auction, without any condition that the purchaser should be answerable for duties. The auction duties had been remitted. T. had applied to and obtained permission from the Board of Excise to proceed with the sale without previous payment of the other excise duties to which the goods were by law subject, and shortly afterwards actually paid those duties. The day succeeding the auction, T. made a written application to the commissioners of customs for leave to pay the British Ship (instead of the Foreign Ship) duties of customs upon the commodities, which was granted; and subsequently admitting his liability, requested indulgence and time to make the payment, on different occasions, during a period of time exceeding a year and a half.

The Court were of opinion, that the wines, &c., having passed from the hands of the privileged person, became liable to the duties notwithstanding the statute 7 Anne, c. 12, s. 3; that the price for which they were sold was to be considered as having included both the original value prior to the importation and the sum payable thereon in respect of duties; and that the defendant was to be taken as the agent of the ambassador, *quoad* the former; and the agent of the Crown and the purchaser, *quoad* the latter; and was therefore liable.

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# Amendment.

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## I. OF THE COURT AND JUDGES, JURISDICTION RESPECTING*.

Moody *v.* Aslatt, H. T. 1835. Ex. 1 *C. M. & R.* 771; 3 *D. P. C.* 486.

Amendments are only permitted when necessary for the success of the proceedings.

Action for negligence. The cause had proceeded to issue in the wrong Christian name of the plaintiff; the Court refused to amend the proceedings by inserting the right name, because it was only a misnomer, which was immaterial, there being no plea to that effect.

* Amendments are entirely in the discretion of the Court or Judge to whom the application is made; they are allowed only in the furtherance of justice. (*Rex* v. *Corporation of Grampound*, 7 T. R. 699). It furnishes, however, no ground for refusing permission, that an advantage is taken from one party which he before possessed, since that must be the consequence of every amendment; (*Mestaer*

JONES *v.* EDWARDS, H. T. 1838. Ex. 3 *M. & W.* 218; S. C. 6 *D. P. C.* 369.

There is now no distinction between penal and other actions as to allowing amendments; and, in the former, a second amendment has been permitted when no unreasonable delay was shewn*.

ON the 13th of November plaintiff obtained an order to amend his declaration, the venue having been laid in a wrong county; the defendant being at liberty to plead de novo, on the 22nd he demurred specially; on the 28th, a week's time was granted to join in demurrer; on the 7th December, application was made to amend, which was allowed, the Court holding that there was no difference as to amendments between penal and other actions; and that the only valid objection is, when there has been unnecessary delay.

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REX *v.* ARCHBISHOP OF YORK, E. T. 1834. K. B. 1 *Ad. & E.* 394; S. C. 3 *N. & M.* 453—S. P. DOE *v.* ERRINGTON, T. T. 1834. K. B. 3 *N. & M.* 646.

The Court has refused to interpose to control the terms of an order for amendment made by a Judge at chambers.

IN quare impedit, the declaration charged, in one count, a simoniacal contract; and the record being withdrawn at the trial, other counts were allowed, by an order of a Judge at chambers, to be added, varying the terms and parties to such contract. The Court, considering that the Judge had a discretion to allow such amendment without imposing the payment of costs, refused to interfere.

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CROSS *v.* METCALFE, M. T. 1836. K. B. 5 *Ad. & E.* 800; S. C. 1 *N. & P.* 232.

After a cause has been referred, the consent of the party to be affected by the amendment is indispensable.

AFTER verdict on the trial of this action, all matters, by consent, were referred to arbitration. The replication to one of the pleas being informal, the arbitrator certified to the Court that it would be agreeable to the justice of the case to allow the plaintiff to amend the replication, by substituting for a special replication the general replication de injuriâ. On motion for that purpose—

*Per Cur.*—Can we alter the terms on which the verdict was taken, and the reference made, without consent? It would be exceeding our jurisdiction.

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## II. OF THE CONSTRUCTION OF RULES AND ORDERS TO AMEND.

ENGLEHEART *v.* EYRE, T. T. 1833. K. B. 2 *D. P. C.* 193; S. C. 5 *B. & Ad.* 68.

An order to

A GENERAL order to amend had been obtained in this case; but

v. *Hertz*, 3 M. & S. 450); but leave will never be granted when the proposed alterations would operate prejudicially upon the rights of third persons. Lord *Ellenborough*, in *Hunt* v. *Pasman*, 4 M. & S. 329, observed, that he did not recollect any case in which the Courts had so done.

The mode of obtaining permission to amend, and the terms to be imposed on the party in whose favour the application is granted, depends upon the stage of the proceedings. Any time before actual trial, a Judge at chambers will entertain the application on summons; but, during the trial, the presiding Judge's leave must be obtained; and, after judgment, when an amendment is required, the Court should be moved for a rule nisi. Before trial, there is scarcely any limit to which the power of amendments is not carried, the applicant submitting to such terms, as to costs and otherwise, as the Judge shall deem equitable.

* But, in actions of this description, the plaintiff will not be allowed to amend his declaration after demurrer, where the amendment would not contribute to the furtherance of justice. (*Matthews* v. *Smith*, 1 Hodges, 175).

it was suggested that the amendment had been carried further than the terms of the order, taken with reference to the subject-matter, authorized. The Court granted the defendant leave to inspect the record, to ascertain whether any excess had been committed.

amend, though general in its terms, must be construed with reference to its object *.

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SIMPSON *v.* COOPER, H. T. 1836. C. P. 2 *Scott*, 840.

JUDGMENT was signed for want of a plea. On motion to set it aside, it appeared that the declaration was delivered on the 12th January. On the 13th, a Judge's order was obtained for seven days' time to plead, the defendant undertaking to receive short notice of trial for the last sitting in the present term. The question was, whether the seven days were to be reckoned in addition to the four days which the defendant originally had by the practice of the Court:—Held, that the seven days commenced from the date of the order.

Where an order is made for seven days' time to plead on amendment, the days are calculated from the date.

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FAGG *v.* BORSLEY, T. T. 1833. Ex. 1 *C. & M.* 770; S. C. 3 *Tyrw.* 905; S. C. 2 *D. P. C.* 107.

THE plaintiff had obtained leave to amend, with liberty for the defendant to plead de novo or to demur, and did not alter the old counts, but added new counts on the same cause of action. The defendant did not plead de novo, but allowed the old plea to remain upon the record; and, without giving a rule to plead or demanding a plea, the plaintiff signed judgment as for want of a plea. Judgment set aside as irregular.

*See* 3 *B. & A.* 137.

After amendment of declaration, with liberty to plead de novo, original plea will stand, if applicable, and defendant need not plead anew.

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## III. OF WAIVER OF LEAVE TO AMEND.

BLACK *v.* SANGSTER, M. T. 1834. Ex. 1 *C. M. & R.* 521; S. C. 5 *Tyrw.* 171; S. C. 3 *D. P. C.* 206.

ON motion for a new trial, it appeared that the plaintiff, previously to the assizes, obtained a Judge's order giving him liberty to amend, and the defendant was to have two days' time to plead anew; the plaintiff, afterwards, delivered the issue, and took no further notice of the order, either by amending or rescinding it; and, though the defendant returned the issue as irregular, the plaintiff proceeded to trial and got a verdict. The Court refused to set aside

After obtaining an order that the party shall be at liberty to amend, it may be abandoned †.

* In an action against bail, under an order to amend, the plaintiff has no right, without leave of the Court, to amend the postea as to the finding of the jury in the action against the principal. (Vide *Engleheart* v. *Eyre*, p. 158).

If a plaintiff takes out a summons to amend his declaration, the defendant has a right to presume that it will be followed up by a peremptory summons; and, therefore, it will operate as a stay of proceedings for one day; consequently, when the time for pleading was out on the day on which the peremptory summons could be made returnable, a judgment signed, for want of a plea, on the morning of the next day, was held irregular. (*Patteson*, J.—*Hodgson* v. *Caley*, H. T. 1840, B. C., 8 D. P. C. 318).

If a plaintiff amend his declaration after a defendant has obtained time to plead, on the usual terms of pleading issuably, &c., the latter is at liberty to demur specially to the declaration. (*Children* v. *Mannering*, 8 D. P. C. 120. See 6 D. P. C. 371).

† But notice of his intention to abandon should be given. (*Solly* v. *Richardson*, T. T. 1838, B. C., 6 D. P. C. 774).

the verdict as irregular. As the order, in the *present case*, gave liberty to amend, the plaintiff therefore *had an option.*

## IV. OF THE TIME OF AMENDING.

### 1st.—Before Trial.

#### (*a*) Of amending mesne process*.

##### 1. *Writ of Capias, and Copy thereof.*

Colston *v.* Berens, M. T. 1834. Ex. 3 *D. P. C.* 253.

Since the Uniformity of Process Act gives a particular form of capias, the Court will not allow it to be amended,

Application to amend writ of capias, which was directed to the Sheriff of Middesex, instead of Middlesex: the Court held, that the writ could not be amended; but suggested a doubt whether the error itself was material, as it could not mislead.

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Mills *v.* Gossett, H. T. 1835. C. P. 1 *Scott*, 313.

as by the substitution of one cause of action for another;

The writ of capias, in this case, was "on promises." On motion to amend the writ by making it in an action of "debt,"

*Per Cur.*—We cannot grant the amendment. The fact has been frequently considered, and the result is, that such amendments should not be allowed.

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Partridge *v.* Wallbank, E. T. 1836. Ex. 1 *M. & W.* 316.

unless all remedy would be lost by refusing the application†;

The writ in this case had been sued "as on promises." The plaintiff's claim was on a bond and for money paid. On motion to amend the writ of summons to an action of "debt," otherwise the debt would be barred by the Statute of Limitations, six years having elapsed, *Parke*, B., refused the application, as the remedy on the bond would remain.

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Byfield *v.* Street, T. T. 1833. C. P. 3 *M. & Scott*, 407; S. C. 10 *Bing.* 227; S. C. 2 *D. P. C.* 739.

nor is the copy delivered to the defendant upon his arrest, when it varies from the writ, itself amendable.

A copy of a writ of capias, served on the defendant on his arrest, was defective, as it left a blank for the day of the month, and was dated in the ninth year of the reign of his present Majesty, instead of the third year of the reign. On motion to amend—

*Per Cur.*—This is not a motion to amend the writ, but the copy. Now, we have power to amend a writ, because it is the act of and in the custody of the Court; but the copy of a writ is the act of the party, over which the Court has no control, and, in this case, is in the possession of the defendant by the delivery of the officer who at the time arrested the defendant.

* Formerly, the Court or a Judge, upon application, would allow a writ on mesne process to be amended, (*Stevenson* v. *Danvers*, 2 B. & P. 109; *Adams* v. *Luck*, 3 Brod. & B. 25, 6 B. M. 113; *Carty* v. *Ashleigh*, 2 W. Bl. 918), even after issue joined (*Carr* v. *Shaw*, 7 T. R. 299), if the amendment would not have the effect of charging the bail, (*Inman* v. *Huish*, 2 New Rep. 133), or of preventing the defendant from proceeding in an action for false imprisonment for an arrest under it; (*Anon.* 1 Tidd, 160); unless, indeed, the defect in the writ rendered it a nullity altogether. (*Kenworthy* v. *Peppiat*, 4 B. & A. 288). See 9 D. & R. 124.

† And not even then to the extent of adding the name of a co-plaintiff. (*Lakin* v. *Massie*, Ex. 4 Tyrw. 839, 2 C. & M. 685, and 2 D. P. C. 633).

HODGKINSON *v.* HODGKINSON, T. T. 1834. K. B. 3 *N. & M.* 564; S. C. 2 *D. P. C.* 535.

APPLICATION to discharge defendant on common bail. The copy of the writ purported to be directed to the Sheriff of Middesex, the original to the Sheriff of Middlesex. The Court held, that the omission of a letter is immaterial, if it be not productive of a variation either in sound or sense; but, if it do, it is material: here it produces both.—*Rule absolute.*

In case of minute defects, application to amend unnecessary.

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SHIRLEY *v.* JACOBS, M. T. 1834. C. P. 1 *Scott*, 67—S. P. URQUHART *v.* DICK, 3 *D. P. C.* 17—COOPER *v.* WALKER, *Id.* 167.

A WRIT of capias was indorsed with the word "service" instead of "execution." A judge at chambers ordered the bail-bond to be cancelled. On motion to rescind that order—

*Per Cur.*—We think that the order in the present case has gone a little too far in directing the proceedings to be set aside, but the present rule must be discharged, the plaintiff having leave to amend his writ on payment of the costs of that amendment, and the defendant having four days to put in bail.

Indorsements on the writ, where the word "execution" has been used, instead of service, have been amended.

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HOULDEN *v.* FASSON, H. T. 1830. C. P. 4 *M. & P.* 126.

AFTER a writ of capias had been executed, a motion was made to amend the writ, which was returnable on a day certain instead of a general return day. In answer to the application, the case, *Johnson* v. *Dobell*, 1 M. & P. 28, was relied on; where the defendant, having been arrested on a capias returnable on a day certain instead of on a general return day, and given a bail-bond to the sheriff, the Court refused an amendment of the writ, unless the plaintiff would consent to discharge the bail upon the defendant's entering a common appearance.

And the Court decided that case was an answer to the application. See ante, 158 n.

A capias can never be amended where it would prejudice bail.

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2. *Writ of Summons and Copy thereof.* (See, also, ante, p. 160, *Capias*).

WAKELING *v.* WATSON, E. T. 1831. Ex. 1 *C. & J.* 467; S. C. 1 *Tyrw.* 377—S. P. WILLIAMS *v.* HALL, 1 *C. & J.* 467 n.—*See* MORRIS *v.* HERBERT. 1 *Price*, 245, *contra.*

COPY of writ served on defendant, tested in name of the late Chief Baron, Sir W. Alexander. A rule having been obtained to set it aside as irregular, the Court intimated, that a rule to amend the writ might be granted, and the amendment shewn for cause.

*See* 3 *Wils.* 454; 7 *T. R.* 299; 3 *B. & P.* 109; 1 *Marsh.* 399; 2 *N. R.* 133; 1 *Chit. Rep.* 309; 2 *Id.* 355.

At one period writs of summons were allowed to be amended;

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LAKIN *v.* WATSON, E. T. 1834. Ex. 2 *D. P. C.* 633; S. C. 4 *Tyrw.* 839; 2 *C. & M.* 685.

IN an action by executors, on motion to amend the writ of summons on payment of costs, as the statute of limitations would be a bar to a fresh action—

but now errors in them cannot be rectified af-

ter service, except when the action would be barred by statute of limitations*;

*Per Parke*, B.—All the Judges have come to the resolution, that, in future, since the Uniformity of Process Act, no amendment of this kind ought to be allowed, unless where the statute of limitations would be a bar, and that that is to be the only exception.

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HORTON *v.* THE INHABITANTS OF STAMFORD, T. T. 1833. Ex. 1 *C. & M.* 773; S. C. 3 *Tyrw.* 869; S. C. 2 *D. P. C.* 96.

and upon that ground proceedings were amended by inserting "Borough of Stamford" instead of "Hundred of S.," there being no such hundred;

PROCEEDINGS had been commenced in Hilary Term, against the Hundred of Stamford, under 7 & 8 Geo. 4, c. 31; and, in Easter Term following, application was made to amend them, by substituting in the writ, the words "Borough of S.," instead of "Hundred of S." The Court allowed the amendment as prayed, the time for instituting a fresh action having expired, observing, that in *Carr* v. *Shaw*, 7 T. R. 299, the Christian name was allowed to be altered, although there was nothing to amend by.

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ROBERTS *v.* BATE, E. T. 1837. K. B. 6 *Ad. & E.* 778.

but even where no remedy was open, the Queen's Bench refused to allow the amendment.

To this declaration, the defendants pleaded in abatement the non-joinder of one Hill, who was alleged to have been their partner. The six years from the accruing of the cause of action having expired, the plaintiffs obtained a rule to shew cause why the plea in abatement should not be set aside, or why the plaintiffs should not be at liberty to amend the writ. The case of *Lakin* v. *Watson*, 2 C. & M. 685 was cited.

*Sed per Cur.*—We have every possible disposition to bow to any decision adopted, on consideration, by the Court of Exchequer or any other court; but we doubt the power of the courts to do any such thing as was there done. We doubt whether parties named in writs, and having by the manner in which they are named certain defined rights, are to be deprived of them by an alteration which the opposite party finds necessary in consequence of his own mistake. It is said to be reasonable and just under the circumstances of this case that the amendment should be made; but we cannot see why the amendment should be permitted for the purpose of saving the statute of limitations more than on any other account.

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TROTTER *v.* BASS, H. T. 1835. C. P. 1 *Bing. N. S.* 516; S. C. 1 *Scott*, 403; S. C. 3 *D. P. C.* 407.

A Judge at Chambers cannot alter the amount indorsed on the writ of summons, so as to bring the case under 20*l.*, to give the sheriff jurisdiction;

THE writ of summons had been indorsed for 25*l.*, but after it had been served, the plaintiff discovered that his demand was reducible to 15*l.* by a set-off. On a summons before a judge, the amendment was allowed; but the Court rescinded the order, remarking, that a party has no right to take his chance of using the higher scale of costs and then amending.

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EDGE *v.* SHAW, T. T. 1835. Ex. 2 *C. M. & R.* 415; S. C. 4 *D. P. C.* 189.

but the Court directed an amendment af-

UPON a writ of trial before the under-sheriff, the particulars claiming 16*l.* 10*s.* 8*d.*, the writ of summons, being put in, appeared

* And not even then by adding the names of a co-plaintiff. (*Lakin* v. *Watson*, Ex., 4 Tyrw. 839; S. C. 2 *C. & M.* 685; S. C. 2 *D. P. C.* 633).

to be indorsed for 58*l.*; and after verdict found for the defendant, a new trial was ordered on ground of misdirections. The Court allowed the indorsement to be amended without applying to a judge.

ter a trial irregularly held before sheriff, with an indorsement for too large a sum.

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SIGGERS *v.* SANSOM, M. T. 1833. C. P. 2 *D. P. C.* 745.

ON motion to set aside a writ of summons, it appeared, that the summons in the first instance had been issued into M.; but, the attorney, discovering he had made a mistake in the county, altered it into the county of S., but without having the writ resealed. The defendant took out a summons to stay proceedings on payment of debt and costs, and an order was made accordingly: this, it was contended, waived the irregularity.

An amendment of a writ by the plaintiff's attorney, and then serving it without having it resealed, is gross misconduct.

*Sed per Cur.*—We shall stay proceedings on payment of the debt only. The conduct of the attorney was grossly improper. The plaintiff will not be injured by such a course, because he need not pay the attorney his costs.

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### 3. *Writ of Right.*

MILLER *v.* MILLER, T. T. 1835. C. P. 4 *D. P. C.* 144.

THE writ of summons on a writ of right, was returnable originally on the 20th of April, which was a dies non, and was afterwards made returnable on the 20th, being less than fifteen days between the teste and return. After it had been delivered to the sheriff, (before the 20th of April), the demandant's attorney went to the sheriff, took the writ back, and, after altering the return to the 24th of April, so as to give a period of fifteen days between the teste and return, got it resealed. The summons was then taken to the sheriff and delivered to him:—Held regular.

The summons on a writ of right is amendable at any time before it is executed.

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WORLEY dem., BLUNT, ten., H. T. 1833. C. P. 2 *M. & Scott*, 799.

IN a writ of right, the demandant claimed as heir, without shewing how he was heir. On demurrer, motion was made for leave to amend, upon affidavits which stated that the mistake which it sought to rectify arose from an oversight on the part of the pleader.

A writ of right cannot be amended by inserting the addition of a step in the descent;

*Sed per Cur.*—It is an established rule, that, in all real actions brought by an heir on the seisin of his ancestor, the demandant must shew how he is heir; it is not enough to say he is heir to such a one generally, but he must set forth specially in what manner and how he is heir, and that too with accuracy and correctness, otherwise it will be bad on demurrer, or after judgment for the demandant by default or on demurrer. In this case, the demandant has neglected to observe this established rule of the Court; and he comes, after a demurrer, to pray that his count may be amended. It appears to *us* that he has failed to make out a case to entitle him to a favour. The rule against amendments in writs of right is rigid; and it is far more judicious to adhere to a practice sanctioned by a uniform series of decisions than to adopt a contrary course, even if we should be so disposed were the matter res integra.

WEBB dem., LANE ten., M. T. 1828. C. P. 5 *Bing.* 285; S. C. 2 *M. & P.* 478.

but a slight mistake, as where the word "*esplees*" was omitted, may be amended.

IN a writ of right a blank was left for the word "esplees." The tenant signed judgment. On motion to set it aside—

The Court thought the irregularity not sufficiently important to authorize judgment being signed; and allowed the demandant to amend.

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MILLER dem., MILLER ten., T. T. 1835. C. P. 2 *Bing. N. S.* 66.

So, where a writ of summons was wrongly dated, it may be amended before acted upon;

ON a writ of right, after the delivery of a writ of summons to the sheriff, but before he had acted on it, demandant's attorney discovered that it was returnable on a dies non, altered the return day, and procured the writ to be re-sealed, giving the tenant notice of the newly inserted return day. On motion to set it aside—

The Court discharged the rule, observing, the alteration objected to is upon the re-sealing, the act of the officer of the Court; and it is no more than if, forgetting for a moment that the day fixed for the return of the writ was a dies non, he had upon recollection, before the writ was issued, inserted a proper day.

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TWINING dem., LOWNDES ten., T. T. 1835. C. P. 2 *Scott*, 260; S. C. 2 *Bing. N. S.* 133.

and where a defendant demurred, the Court allowed him to plead after argument.

IN this case, to a count in a writ of right the tenant demurred. But the Court being of opinion that the demurrer could not be sustained, the tenant moved for leave to withdraw the demurrer, and be allowed to plead.

*And per Cur.*—There is great reason for distinguishing between applications on the part of the demandant and applications on the part of the tenant. *Charlwood* v. *Morgan* shews, that the principle on which the Court acts in these cases is to discourage disturbance of ancient possession; but here the tenant himself proposes to withdraw an obstacle to the demandant's claim.

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### 4. *Writ of Attachment.*

POPKINS *v.* AMORY, E. T. 1831. C. P. 5 *M. & P.* 319; S. C. *by the name of* POPKINS *v.* SMITH, 7 *Bing.* 434.

Where there were too few days between the teste and return of an attachment of privilege, it was amended.

THIS was an application to set aside a writ of attachment of privilege, on the ground that there were not fifteen days between the teste and return.

It was opposed, on the authority of the case of *Davis* v. *Owen*, (1 B. & P. 342), where there were not fifteen days between the teste and return of a capias, and the Court allowed it to be amended.

But the Court refused to allow the plaintiff to amend the writ, without payment of costs.

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(*b*) Of amending the declaration *,

Storr *v.* Watson, H. T. 1836. C. P. 2 *Scott*, 842.

In an action on the case for negligence with respect to goods entrusted by the plaintiff to the care of the defendant; after issue joined, and a peremptory undertaking to try the case, the record was withdrawn, with a view to obtain leave to amend the count, or to add thereto a count in trover. On motion for that purpose—

*Per Cur.*—We think plaintiff ought to be allowed to turn the present count into a count in trover, upon payment to the defendant of costs.

Even after issue joined, and a peremptory undertaking given, the declaration may be amended by the substitution of one count for another;

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Green *v.* Mitton, E. T. 1832. 4 *B. & Ad.* 369; S. C. 1 *N. & M.* 673.

This was an action of trover; and after the record was complete, application was made for leave to amend, by substituting a count in detinue instead of the count in trover; and also to add a count in debt. It now appeared that the action was commenced in Hilary Term, 1831, and the motion to amend was made in Easter Term, 1832.

*Per Cur.*—We cannot allow the amendment: the case of *Levett* v. *Kibblewhite*, 6 Taunt. 483, was very different; that was changing assumpsit into debt.

but not to change the entire form of action, as trover, into an action of debt and detinue.

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Dale *v.* Gordon, T. T. 1833. C. P. 3 *M. & Scott*, 339.

This was an action against the sheriff for taking insufficient sureties in a replevin. On a rule to shew cause why the plaintiff should not be at liberty to amend his declaration by adding a count, alleging that the plaintiff in the replevin cause did not prosecute his suit with effect or without delay, and that the arrears of rent due to the plaintiff had not been paid or satisfied—

*Per Cur.*—The amendment ought to be allowed, as it was merely intended by the introduction of certain facts upon the face of the record to raise the question whether or not the defendant, as sheriff, was liable.

A new count may be added when its introduction is to raise the real question between the parties;

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Norcutt *v.* Mottram, H. T. 1839. C. P. 7 *Scott*, 176.

On motion to amend in an action of trover, it appeared that the count alleged that the plaintiff was possessed of the goods in question as assignee, and a conversion by the defendant after the insolvency, when, in fact, it took place before the insolvency.

as a count in trover, stating the conversion correctly to be in the time of

* An order for leave to amend the declaration in any matter of form, as in the title, (1 East, Rep. 133), venue, (4 East, 433; 6 Taunt. 408), or names of the parties, (1 Lord Raym. 116), is almost of course, and granted at any time, without payment of costs, except the costs of the application. Where the declaration is amended in substance, if the order for amendment is obtained before plea, there are no costs other than those of the application; but when the application is made after plea or demurrer, the order is generally granted on payment of costs. (Tidd's Prac. 597). As to the nature of the amendments permitted, they are infinitely varied, according to the exigencies of parties, and to meet the justice of particular cases. When it becomes necessary to introduce a new count, varying the statement of the cause of action, the motion should be for leave to amend by withdrawing the insufficient count and substituting that which is proposed to be introduced. (Bagley's Pr. 334).

the assignees, and not of the insolvent.

*Per Cur.*—The amendment ought to be allowed, conceiving that the variance would be ground of nonsuit, and nothing more.

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BAKER *v.* NEAVER, M. T. 1832. Ex. 1 *C. & M.* 112; S. C. 1 *D. P. C.* 616—S. P. HOLLAND *v.* PHILLIPS, E. T. 1839. Q. B. 2 *P. & D.* 336.

So a declaration may be amended by making the official assignee a party to the suit.

MOTION for leave to amend declaration by making the official assignee a party to the suit with the plaintiff, who was the other assignee of a bankrupt. After its being contended that there was nothing to amend by—

*Per Cour.*—The official assignee is a person appointed under the provision of an act of Parliament; and this, therefore, is very different from the case of an ordinary plaintiff. If the defendant can make any affidavit that he defended this action on the ground that the official assignee was not joined, that might be a reason for refusing this application. Unless he can do so, we think it is reasonable that we should allow the amendment to be made, on payment of costs.

*See* 1 *B. & P.* 481.

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LAKIN *v.* WATSON, E. T. 1834. Ex. 2 *D. P. C.* 633; S. C. 2 *C. & M.* 685; 4 *Tyrw.* 839.

So, after a plea in abatement of nonjoinder, writ and declaration were allowed to be amended by adding the name of the omitted co-defendant to avoid the action being barred by time;

THIS was an action on a promissory note by executors, in which, after a plea in abatement of non-joinder, a rule had been obtained to amend the writ by adding the name of a co-executrix. The affidavit on which the rule was granted was, that her name was omitted through mistake; and that the Statute of Limitations would be a bar, and the debt be lost, if a new action be commenced.

The Court allowed the amendment; but stated, that, in future, no amendment of the kind ought to be allowed, except where it appears to the Court that the result of a refusal would be to deprive the plaintiff of all remedy.

*See* 1 *C. & M.* 773; *Id.* 112; *and Roberts v. Bate, ante,* 162.

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HORTON *v.* THE HUNDRED OF STAMFORD, T. T. 1833. Ex. 2 *D. P. C.* 96; S. C. 1 *C. & M.* 773.

and in an action against a "hundred," the word "borough" was permitted to be substituted for "hundred," even after time for bringing a fresh action had expired.

DECLARATION against the inhabitants of a hundred for damage done by a mob, under the 7 & 8 Geo. 4, c. 31, described as "the inhabitants of the hundred of Stamford;" the amendment prayed was, that the "borough of Stamford" might be substituted for the "hundred of Stamford."

The Court observing—Though the plaintiff has called it a hundred, he now finds it to be a borough; the act says, the borough shall be liable where not parcel of any hundred. The plaintiff has made a mistake in the description of the district: the application is to prevent the cause going off otherwise than on the merits; and it would be gross injustice not to allow it; and here they would be too late to commence another action.

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TAYLOR *v.* LYON, H. T. 1829. C. P. 2 *M. & P.* 586; S. C. 5 *Bing.* 333.

So a declaration may be amended.

THE plaintiffs being surviving partners as well as administratrixes of the deceased, commenced an action against the defendant as ad-

ministratrixes. Pleas,—the Statute of Limitations, and that the plaintiffs were not administratrixes of the deceased at the time of the commencement of the suit. On motion for leave to amend, it was sworn that the plaintiffs were the surviving partners as well as the administratrixes of the deceased; and that the debt in question was contracted in the course of a business carried on for the joint benefit of deceased and the plaintiffs; and that the plea of the Statute of Limitations would be fatal to any new action.

ed, where defendant is described as administratrix, but the administration is not taken out until after action brought, where the Statute of Limitations would be a bar*;

*Per Cur.*—Questions of amendment are purely for the consideration of the Court. Although the plaintiffs' cause of action is founded on a stale demand, the defendant has not alleged that he has been deprived of the testimony of any witness by death or otherwise; and if he has a good defence to the action, the amendment will be beneficial to him, as he will be entitled to costs.

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AYLWIN *v.* DISMORE, T. T. 1834. C. P. 1 *Bing. N. S.* 170.

and such amendments are allowed, even after the lapse of years, where defendant cause of delay†.

THIS action, on a charter-party, had been commenced in 1815, but had been by various proceedings in equity, and the death of parties, delayed till the present term; when an application was made to amend the declaration by striking out the count upon the charter-party, and declaring for freight not upon the charter-party, the defendant having been the occasion of the delay, and having, by the allegations in his bill in Chancery in 1815, misled the plaintiff as to the effect of the charter-party: an application to amend was granted, on the ground that the defendant had been virtually the cause of the delay.

*See* 6 *Taunt.* 419; 4 *B. & Ad.* 369; 6 *T. R.* 171.

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EUBANKE *v.* OWEN, T. T. 1836. K. B. 5 *A. & E.* 298; S. C. 6 *N. & M.* 799.

But the Court has refused to allow the husband of a married woman to be made a party without his consent‡;

ON motion to discharge a Judge's order, it appeared that the plaintiff, a married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single. Having paid rent to A., of whom she took the premises, under a threat of distress, she was distrained upon by B., claiming to be the landlord, for the same rent; she brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A Judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration.

The Court said—In this case, we should be glad to give relief in it, if we had the power; but we see no legal ground upon which we can interfere in the manner pointed out by the order, unless by the husband's consent; and it must therefore be set aside.

* So where in debt each count was for 100*l.*, and the particulars for 168*l.* Lord *Denman*, C. J., allowed each count to be amended. (T. O. 200; *Dew* v. *Katz*, M. T. 1837, N. P., 8 C. & P. 315).

† So allowed, although declaration filed more than two terms before application made. (*Horston* v. *Shilliter*, 6 Moore, 496).

‡ So one of several defendants in debt, against whom there was no evidence, to be struck out of the declaration. (*Cooper* v. *Whitehouse*, 1834, N. P., 6 C. & P. 545).

WOOD *v.* GRIMWOOD, H. T. 1830. K. B. 5 *M. & R.* 584.

nor in a qui tam action will it be allowed, where the plaintiff has withdrawn the record.

IN an action for penalties under the statute 12 Ann. c. 16, the declaration contained fifty-two counts. The plaintiff set the cause down for trial, and then withdrew the record. On motion for leave to amend by adding sixteen counts more—

*Per Cur.*—We cannot grant the amendment; we think a party, who, after he has commenced such an action, has been guilty of any delay, is not entitled to any indulgence. Here the action was commenced in September, 1829, and plaintiff did not proceed to trial.

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RUST *v.* KENNEDY, H. T. 1839. Ex. 4 *M. & W.* 586.

The defendant may compel the plaintiff to amend where the former is misnamed.

IN an action on a bill of exchange, a motion was made to set aside the writ and declaration, on the ground that the defendant was described in the writ served and declaration by his initials only.

*Per Cur.*—Before the stat. 3 & 4 Will. 4, c. 42, s. 11, where the declaration and process corresponded, and the only objection was a misnomer, that was a matter pleadable in abatement; but since the passing of that act, the only remedy is for the party to take out a summons to amend.

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FAGG *v.* BORSLEY, T. T. 1833. Ex. 1 *C. & M.* 770; 2 *D. P. C.* 107; S. C. 3 *Tyrw.* 905.

If liberty to plead de novo be given after amending declaration, and the old pleas be applicable to amended declaration, plaintiff cannot sign judgment, without rule to plead or demand of plea.

LEAVE to amend declaration had been obtained, the defendant being at liberty to plead de novo, or demur. The plaintiff added counts to the declaration. No rule to plead was given or demand made; the plaintiff signed judgment, though the original pleas remained. The judgment was set aside, *Bayley*, B., saying—That if there are pleas pleaded, and the defendant has liberty given to plead de novo, the former pleas are good, if they apply to the amended declaration.

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THOMAS *v.* JACKSON, H. T. 1825. C. P. 4 *Bing.* 453, S. C. 10 *Moore*, 152.

After leave to amend, by adding counts, and the defendant has pleaded, he cannot apply to strike out counts.

A DECLARATION in slander contained thirty-three counts. After an amendment had been allowed, the defendant pleaded a justification, when the plaintiff again applied for leave to amend his declaration; and the plaintiff obtained a further order to amend, by inserting three additional counts, and the defendant had a rule to plead de novo, which he had allowed to expire, and then applied to strike out some of the counts.

*Sed Per Cur.*—Although the defendant had leave to plead de novo it would not have the effect of allowing him to apply to the Court to strike out some of the counts, as being unnecessary or superfluous. He should have raised the objection at the time the order was made for the last amendment.

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(*c*) OF PLEADING AFTER AMENDING DECLARATION.

REG. GEN., E. T. 1831. C. P. 5 *M. & P.* 482.

Defendant is entitled to two days to plead,

WHERE any amendment in the declaration shall be made after a rule to plead shall have been entered, no new rule to plead shall be necessary; provided such amendment be made in the term, or the

vacation succeeding the term, in or of which the rule to plead shall have been entered; and the defendant shall have two days, exclusive of the day on which the amendment shall be actually made, to alter his plea or plead de novo, unless otherwise ordered by the Court or the judge granting leave for the amendment.

but no new rule to plead was essential if amendment were made in the *same term* or *succeeding vacation;*

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REG. GEN., H. T. 1832. C. P., K. B., & EX.

IT is ordered, that where an amendment of the declaration is allowed no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration or of a different term.

but this distinction no longer exists.

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COLLINS *v.* AARON, H. T. 1838. C. P. 5 *Scott*, 595.

IN assumpsit for goods sold, the declaration concluded to the plaintiff's damage of 100*l.* The plaintiff, by his previous demand, claimed only a balance of 85*l.* The defendant pleaded payment of 33*0l.* as an accord and satisfaction. Under an order to amend, the plaintiff recovered the damages stated in the declaration. The defendant afterwards applied for leave to plead *de novo*. But the Court said, "The defendant has brought upon himself the inconvenience of which he complains, by pleading in such a manner as to compel the plaintiff to amend his declaration. When the declaration was amended, the defendant should have asked the judge to allow his plea to be amended, in as far as such amendment was rendered necessary by the amendment of the declaration. If such an amendment had been asked, it would no doubt have been granted immediately. But we cannot allow the defendant to plead *de novo*."

On amendment of declaration after plea, defendant has no right to plead *de novo*, unless it forms part of the Judge's order.

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(*d*) OF AMENDING THE APPEARANCE*.

BATE *v.* BOLTON, H. T. 1836. EX. 4 *D. P. C.* 677.

THE defendant appeared, and afterwards gave notice to the plaintiff of the second appearance being entered, and demanded a declaration, and for want of a declaration signed judgment of non pros. The question now was, whether the defendant was not at liberty to enter an appearance, as the first was in a wrong name. It was contended, that the first appearance could not be altered; the 2 Will. 4, c. 39, s. 2, directing that the mode of appearance shall be in the forms given in the schedule, and shall be dated on the day of the entering thereof.

A defendant who enters an appearance by a wrong name, cannot enter another and sign judgment, but should amend the first.

And *Per Cur.*—The first appearance should have been altered: and the rule for setting aside the non pros. must be made absolute.

* An erroneous appearance may be amended by either party. Where the plaintiff entered an appearance for the defendant by a wrong name, it was amended, even after declaration. (*Whedon* v. *Packmon*, 3 Wils. 49). See post tit. "*Appearance.*"

### (*e*) Of amending pleas *.

HUBER *v.* STEINER, H. T. 1834. C. P. 2 *D. P. C.* 781.

Pleas may be amended or added, even after issue joined;

THIS was an action on a promissory note; after pleas, that the defendant did not draw the note, and Statute of Limitations, on which issue was joined, the defendant applied for leave to add a plea, shewing that, by the French law, the plaintiff's right of action was barred by lapse of time. The Court allowed the plea to be added, after imposing the terms of the defendant admitting the handwriting, and consenting to a judgment as of the term.

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JONES *v.* ROBERTS, T. T. 1834. Ex. 2 *D. P. C.* 698.

and after a replication and motion for judgment on an issue on nul tiel record*.

ON motion for judgment on replication of nul tiel record, a counter-application was made for leave to amend, by striking out the allegation of the judgment, as it had since been discovered there had been a judgment by default. The Court allowed the amendment.

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JAULERRY *v.* BRITTEN, H. T. 1838. C. P. 5 *Scott*, 655.

In some instances before an amendment will be allowed an affidavit will be required.

BY 6 Geo. 4, c. 94, it is enacted, that it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any goods, wares, or merchandizes, or certain documents, in deposit or pledge, from factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice, that the person or persons making such deposit or pledge, is or are a factor or factors, agent or agents; but then and in that case, such person or persons, body or bodies politic or corporate, shall require no further or other right, title, or interest, in or upon or to the said goods, wares, or merchandize, or any such document as aforesaid for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge, as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid, any rule of law, usage or custom, to the contrary notwithstanding.

On motion to amend in an action of trover, pleas, stating a pledge by a party holding goods, but not appearing to hold them, as factor or agent for the owner.

The Court required an affidavit of the facts before they would allow an amendment to bring the case within the statute.

* A defendant can, in no case, wave his plea without leave of the Court, or a judge's *order*; (Rule H. T. 2 Wms. 4); but he may, in general, obtain an order to amend or substitute pleas, upon payment of costs. (1 Chit. Rep. 76). Pleas in abatement, however, are not amendable; because they are dilatory pleas, and do not go to the merits of the action. (Ca. Prac. C. P. 29). See note Tit. Abatement, pleas in. If the application to amend is reasonable, the order may be obtained at any time, and although previous orders to amend have been granted. Thus, a plea of judgment recovered by an executor was allowed to be amended in the sum for which the judgment was recovered after issue joined. (1 H. Bl. 238; 8 Moore, 584). See *Storor* v. *Gordon*, 2 Chit. 27).

† And, under favourable circumstances, the Court allowed a defendant to add a plea, that there was no contract in writing within the meaning of the Statute of

### (*f*) Of amending replication and subsequent pleadings*.

Kelly *v.* Flint, M. T. 1836. Ex. 5 *D. P. C.* 293.

After replying, damages ultra to a plea of payment, the plaintiff may amend and accept the money in satisfaction on payment of costs.

To a plea of payment of money into court, the plaintiff replied, that he had sustained damages to a greater amount. The plaintiff not proceeding to trial, judgment was moved for as in case of a nonsuit. On shewing cause, the plaintiff applied to amend, by accepting the money paid into court.

The Court allowed the amendment, upon the plaintiff paying all the costs subsequent to the payment into court.

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### (*g*) Of amending after demurrer.

Cooper *v.* Phillips, M. T. 1834. Ex. 1 *C. M. & R.* 649—S. P. 5 *Tyrw.* 166; 3 *D. P. C.* 167.

Leave may be obtained to amend after argument on demurrer†.

To an action for goods sold, the defendant pleaded, that he, being in embarrassed circumstances, agreed with his creditors to pay a composition, and that he was ready to pay the same, but that the plaintiff refused to receive it. On demurrer, after argument, the Court held the plea bad, but gave leave to amend.

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Brazier *v.* Jones, H. T. 1827. K. B. 6 *B. & C.* 196; S. C. 9 *D. & R.* 349.

Even in an action against Marshal of the Queen's Bench,

In an action against the marshal for an escape, the bill was intitled generally of Michaelmas Term, and the escape was alleged to have taken place on the 15th of November.

There was a special demurrer, for that the cause of action appeared to have accrued after the first day of the term to which the bill had relation. The Court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit that the prisoner had returned into the custody of the marshal before any application for liberty to amend was made.

Frauds; (*Smith* v. *Dixon*, 1 Har. & W. 668); but, in an action for slander, after verdict for the plaintiff, the Court refused to allow the defendant to add a plea of justification upon any terms. (*Kirby* v. *Simpson*, 3 D. P. C. 791). And, where non assumpsit was pleaded in an action of trover, *Parke*, J., discharged the jury; both parties refusing to consent to an amendment. (*Bent* v. *Benyon*, H. T. 1834, N. P., 6 C. & P. 217).

In an action on a foreign promissory note, after issue joined, the defendant was allowed to amend his plea, by pleading, that the cause of action was barred by lapse of time. (*Huber* v. *Steiner*, H. T. 1834; C. P., 2 D. P. C. 781).

* The replication and subsequent pleadings may be amended in the same manner as the plea. Leave has been given to amend a replication after a cause has been taken down for trial and made a remanet. (Sayer's Rep. 285). And where the plaintiff omitted to reply, and the defendant added the similiter as if the plaintiff had replied, leave was given to amend, by inserting the replication, upon payment of the costs of the application, but a motion to amend a replication after a nonsuit has been refused. (3 Burr. 1682; 2 Wils. 243).

In *Solomons* v. *Lyon*, 1 East, 369; where there was a bad replication to a sham plea, the Court allowed the plaintiff to amend, even without payment of costs.

Pleas, not guilty, and nul tiel record. After trial of the cause on the first plea; held, that the prayer to the replication to the second plea might be amended. (*Coleridge*, J.—*George* v. *Rookes*, E. T. 1840, B. C., 8 D. P. C, 505).

† S. P. *Jackson* v. *Ford*, 3 Wils. 413; but this is not usual if the Court in the progress of the discussion intimate an opinion unfavourable to the party arguing, and he elects to persevere in obtaining the judgment of the Court.

ATKINSON *v.* BAYNTUN, E. T. 1835. C. P. 1 *Bing. N. S.* 740; S. C. 1 *Scott*, 424.

and even after judgment on demurrer, it has been permitted on an affidavit of the discovery of material facts;

AFTER demurrer by defendant to plaintiff's replication and argument, and judgment against the defendant, he applied to a Judge at chambers; and, on affidavit, that new and important matter had come to his knowledge, obtained an order to amend. The Court, after some hesitation, discharged a rule to rescind such order; at the same time, they expressed an opinion, that the course pursued by the defendant was irregular, as he should have applied to amend before argument and judgment. The defendant was directed to pay the costs of the rule and of the amendment.

BRAMAH *v.* ROBERTS, H. T. 1835. C. P. 1 *Scott*, 364.

or on merits being distinctly shewn.

To an action on a bill of exchange, the defendants pleaded, that they were defrauded of the bill by a third person, in whose hands it had been placed for a special purpose; that the plaintiffs had notice of the fraud, and that they received the bill without giving any consideration or value for the indorsement. The plaintiffs replied, that, after the making of the bill, and before it became due and payable, it was indorsed and delivered to them fairly and bonâ fide, and for a good and valuable consideration. On demurrer, after argument and judgment for the plaintiff on a special demurrer, the Court refused to allow the defendant to withdraw his demurrer without an affidavit distinctly exhibiting a defence upon the merits.

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JONES *v.* ROBERTS, T. T. 1834. Ex. 2 *D. P. C.* 698.

After leave given to defendant to amend on demurrer and each party pleads de novo, the defendant may, under circumstances again amend;

IN this case there had been a demurrer to the rejoinder; (*see S. C.* 2 *C. & M.* 319); the defendant had obtained leave to amend; after this amendment the parties pleaded de novo: and, from the course pursued by the plaintiff, it became again necessary on the part of the defendant to amend, which the Court, on motion, permitted.

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MUNNINGS *v.* LENNOX, M. T. 1826. C. P. 12 *Moore*, 133.

but new pleas will not be allowed to be added after plaintiff has obtained judgment on demurrer to pleas already pleaded.

COVENANT on a charter-party. The declaration alleged several breaches of covenant by the defendant, to which he pleaded eighteen special pleas.

On demurrer to two of the pleas, the Court held them bad, and gave judgment for the plaintiff. On motion for leave to file two additional pleas, on affidavit of the defendant's attorney, that, since the argument on the demurrer, some circumstances had come to the defendant's knowledge, with which he was wholly unacquainted.

*Per Cur.*—It would be contrary to justice and good faith if we were now to allow the defendant to put new pleas on the record, particularly, when the plaintiff has obtained judgment on those which were bad. Besides, the defendant pleaded no less than eighteen special pleas, when one-fourth part of the number would have been sufficient.

JONES *v.* ROBERTS, H. T. 1834. Ex. 2 *Dew.* 374.

After demurrer when the party has leave to amend upon payment of costs, costs for matters not connected with the demurrer should not be claimed.

AFTER demurrer to the plaintiff's rejoinder, the defendant had leave to amend on payment of costs. He accordingly amended; and upon the taxation of costs the plaintiff claimed for making up paper books with the issues of fact, and for briefs. Before the amendment there were issues of facts and of law, but after the amendment all the issues were issues of fact. On a question of costs—

*Per Bayley*, B.—In making up the demurrer books, there was no necessity to notice the issues of fact. The briefs for arguing the demurrer are allowed. The paper books of the issues of fact, and the briefs on those issues, are not allowed; because, either you had no right to make them up, or if you had, they will be costs in the cause, as they will be still necessary, with a little addition occasioned by the amendment, and that addition will be costs in the cause."

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BADEN *v.* FLIGHT, M. T. 1837. C. P. 5 *Scott*, 273; S. C. 4 *Bing. N. S.* 35; S. C. 6 *D. P. C.* 177.

If a party pays the costs of an amendment under a Judge's order, it is too late afterwards to apply for the costs of the demurrer.

IN an action of covenant, assigning a breach for non-payment of rent. The defendant pleaded (amongst other pleas) that no quarter's rent, ending on the said 25th March, 1836, then became or was due or in arrear, by virtue of the said indenture in the declaration mentioned, modo et formâ. Judgment having been given for the plaintiff on demurrer to this plea, he, on the 3rd May, obtained a Judge's order to amend his declaration, on payment of costs, by striking out the claim for the second quarter's rent. The costs of the amendment were taxed and paid on the 3rd June, and, on the 6th, the defendant obtained the usual order for time to plead to the amended declaration:—The Court held, that the defendant was not entitled to the costs of the demurrer, and that, at all events, it was too late to ask for them, or to disturb the Judge's order after the defendant had received the costs of the amendment under it, and obtained an order for time to plead.

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### (*h*) OF AMENDING THE ISSUE*.

COX *v.* PAINTER, E. T. 1837. K. B. 1 *N. & P.* 581; S. C. 6 *A. & E.* 491.

In general, the issue may be amended in any stage of the proceedings;

ON examining the Nisi Prius record, there did not appear to be any date stated to the writ of summons. *Parke*, B., being applied to to amend, it was contended for the defendant, that he had no power under the 3 & 4 Will. 4, c. 32, s. 23, to amend, as this was not a variance, but an omission on the record. His Lordship doubted the power to amend; but stated, as he had made such an amendment once before, and it had not been appealed against, he would amend; and he called for the production of the writ itself on which the date appeared.

* If there be any irregularity in making up the issue, the defendant's attorney, instead of accepting it, should take out a summons and obtain an order for amending (Tidd, Prac. 669), as the acceptance would operate as a waiver of the irregularity; (3 Burr. 1682; 2 Wils. 243); and, upon the application of either party, a Judge at chambers will order the issue roll to be amended, if the amendment does not alter the substance of the issue between the parties. (1 N. R. 28; 5 Taunt. 164) See post, tit. "*Issue;*" as to returning it when irregularly delivered or not corresponding with the pleadings in the cause.

And, *Per Cur.*—By Rule, H. T. 4 Will. 4, the power of amending is clearly given by the rule itself; and the power is not confined to any particular stage of the proceedings.

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PORIN *v.* DUKE OF BUCKINGHAM, H. T. 1824. C. P. 8 *Moore*, 584.

after notice of trial given and countermanded,

THIS was a motion, made after issue joined and notice of trial countermanded, for leave to amend avowries; which was granted as to the description of the premises, terms of holding, and amounts of rent; also, by inserting exceptions and reservations in the demises laid; and, lastly, by adding new avowries, varying in the amount of rent.

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MORRIS *v.* EVANS, H. T. 1833. Ex. 1 *D. P. C.* 657.

or after a cause had been taken down to the assizes and record withdrawn, the declaration was amended by inserting new counts, varying the statement as to the same cause of action.

ACTION for disturbance of a ferry. The cause had been taken down to the Assizes and the record withdrawn. A motion was made and granted to introduce new counts, in which the termini of the ferry were varied, and also the descriptions of the persons liable to the toll: the Court observing, the rule adopted at chambers is, that you may, at any time, introduce a new count, if you do not thereby introduce a new cause of action, but only a variation in the mode of stating it.

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HOLMES *v.* PINNEY, E. T. 1838. C. P. 6 *D. P. C.* 627; S. C. 6 *Scott*, 346.

The name of one of two partners has been struck out of the record, the defendant's costs being paid by the plaintiff.

THIS was an action by a banking company, established under 7 Geo. 4, c. 45, s. 9. The names of two partners had been improperly introduced, the statute requiring the suit to be carried on in the name of any one of the officers of the company, the Court will allow the record to be amended, on payment of the defendant's costs occasioned thereby, and will not require the action to be discontinued and recommenced.

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TOMLINSON *v.* NANNY, E. T. 1833. Ex. 2 *D. P. C.* 17.

But if improper counts have been introduced in the declaration, it is too late to apply to strike them out after the cause has been taken down to the assizes and tried.

ACTION by executors. Counts on promises to the testator; and, also, a count on an account stated, by the defendant with the plaintiffs as executors, of money due to the plaintiffs as executors, and a promise to pay to them as executors. The defendant pleaded the general issue and the Statute of Limitations, and paid a sum of money into Court generally. A summons had been taken out before the Judge at the assizes to strike out the last count, where the promise was laid to the plaintiffs as executors; but the learned Judge refused the order. At the trial, the plaintiffs failed in proving that more was due by the defendant within the period of six years than was covered by the sum paid into Court; and the defendant had a verdict. On an application for a rule to strike out the count, the Court refused it as too late.

GREEN *v.* MITTON, M. T. 1838. K. B. 4 *B. & Ad.* 369; S. C. 1 *N. & M.* 673.

AFTER issue joined and a peremptory undertaking to try, motion was made to amend, by inserting a count in detinue in lieu of a count in trover, and by adding a count in debt. The affidavits filed by the plaintiff stated that the action was brought for the recovery of certain title-deeds, on which the plaintiffs had lent money; that the declaration was drawn in trover by a special pleader, but the plaintiff's attorney had lately been informed that it ought to be in detinue, and that the object of the parties was to recover the title-deeds.

*Per Cur.*—We cannot allow the amendment; if granted, it would establish an inconvenient rule.

So, after issue joined in trover and a peremptory undertaking given, the plaintiff cannot amend by changing his form of action into debt and detinue.

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ATTWILL *v.* BAKER, H. T. 1837. Ex. 5 *D. P. C.* 462.

ISSUE, before the Secondary, had been delivered in the ordinary form, as at Nisi Prius; and after Judge's order obtained to try before the Secondary, a motion was made to set it aside. The Court discharged the rule, giving the plaintiff leave to amend on payment of costs.

Where a Judge's order has been obtained to try before the Sheriff, it may be amended so as to accord with the prescribed form;

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PEEL *v.* WARD, T. T. 1836. Ex. 1 *M. & W.* 743; S. C. 5 *D. P. C.* 169.

ON motion to set aside the issue, notice of trial, and Judge's order to try before the Sheriff, on the ground that the issue was not drawn up according to the form given by R. H. T. 4 Will. 4, No. 4, but, after stating the pleadings, it concluded in the usual form of an issue at Nisi Prius.

*Per Cur.*—The rule must be absolute. In all cases of trial before the Sheriff, the issue should be made up for that purpose according to the form given by R. H. T. 4 Will. 4, No. 4. As the issue was delivered before the Judge's order to try before the Sheriff, the plaintiff should have obtained an order to amend the issue.

and, if delivered otherwise, and then an order obtained, it should be altered by application to amend.

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FARWIG *v.* COCKERTON, H. T. 1838. Ex. 6 *D. P. C.* 337; S. C. 3 *M. & W.* 169.

AFTER trial on a writ of trial, application was made for leave to amend, there being a variance between the issue and the record, the latter not containing the date of the writ of summons.

*Per Parke*, B.—The question is, whether there is not power to amend under the proviso in the rule H. T., 4 Will. 4; it states that issues, judgments, and other proceedings, in actions commenced by process under 2 Will. 4, c. 39, shall be in a certain form: "provided that, in case of non-compliance, the Court or Judge may give leave to amend." Under this proviso, I think an amendment may be made at any time.

And amendment allowed, even after trial, as to a variance between the dates on the issue and the time of trial.

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(*i*) OF AMENDING PARTICULARS OF DEMAND*.

STAPLES *v.* HOLDSWORTH, T. T. 1838. C. P. 4 *Bing. N. S.* 717; S. C. 6 *D. P. C.* 715; S. C. 6 *Scott*, 605.

ASSUMPSIT for money had and received to the use of the plaintiff. The action was commenced in 1827, and a declaration and parti-

Particulars of demand amend-

* It is quite a matter of course to amend particulars of demand or set off at

ed under peculiar facts, after lapse of ten years from their delivery.

culars of demand delivered, but no further step taken until 1836, when a term's notice was given, and a plea demanded and delivered. The Court subsequently allowed the particulars to be amended, it appearing that the defendant had been in a confidential situation in the employment of the plaintiffs, and that their first particulars were framed on an account delivered by him, which was subsequently found to be incorrect.

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JONES *v.* FOWLER, T. T. 1835. Ex. 4 *D. P. C.* 232.

The acceptance of amended particulars is a waiver of any objection to those first delivered.

THE plaintiff delivered his declaration, with a particular of demand. Two days afterwards, finding that they were wrongly intitled, delivered a fresh particular properly intitled.

It was contended, that the fresh particulars being delivered with a notice that the particulars annexed thereto were delivered in lieu of the particulars annexed to the declaration, it must be considered that those particulars were intended to be delivered as annexed to the declaration in pursuance of the sixth rule.

And *Per Cur.*—The defendant, by accepting them, impliedly admitted them in the place of the old ones, and therefore both parties were left in the same situation as they were in before; the defendant should have rejected the particulars.

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### (*j*) OF AMENDING AFTER EXAMINATION OF WITNESSES ON INTERROGATORIES.

HOLLINGSWORTH *v.* BRIGGS, H. T. 1836. C. P. 2 *Scott*, 794; S. C. 4 *D. P. C.* 643.

Amendments have been allowed after examination of witnesses on interrogatories, where notice of intended application to amend was given to the plaintiff before the examination of the parties.

A JUDGE'S order was obtained for the examination of one of the plaintiff's witnesses. After the order for his examination was made, the defendant was advised by counsel to amend his pleas; and in consequence of such advice, a summons for leave to amend was served upon the opposite party, and the proposed amendments were handed over to him. The witness was examined with reference to the matter of the proposed amendments.

*Per Cur.*—When error is committed in a statement of that which is the substantial matter of action or defence, such error is, we think, in general a proper ground of amendment. Here, the defendant stated his pleas, so as to meet, in his opinion, the nature of his defence; but, upon further consideration, he found that he had acted imprudently, and gave notice to his antagonist, before the examination of the witnesses, of his intention to amend; and the party to whom the notice was thus given made no attempt to postpone the examination. Under these circumstances the rule to amend should be made absolute upon payment of costs.

the instance of the party delivering them. But the delivery of an amended particular without an order will be wholly unavailing; hence, where a particular was delivered under a Judge's order, and a second delivered without such sanction, the plaintiff was not allowed to give evidence of any claim contained in the latter. (See 1 Taunt. 353; 1 Esp. 374).

(*k*) Of amending the writ of trial.

Perceval *v.* Connell, T. T. 1837. C. P. 3 *Bing. N. C.* 877. S. C. 5 *Scott,* 91; 6 *D. P. C.* 681.

The writ of trial may be amended;

After this cause had been tried before the Sheriff, and the plaintiff had obtained a verdict, the defendant discovered that there was a variance between the writ of summons and the writ of trial. On motion to set aside the latter.

*Per Cur.*—We cannot set aside the writ of trial; but we will suspend this motion, in order to enable the plaintiff to apply for leave to amend.

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Lycett *v.* Tennant, H. T. 1838. C. P. 4 *Bing. N. S.* 168.

but not without leave of the Court or a Judge, even to make it correspond with the issue delivered.

On motion to set aside a writ of trial, it appeared, that, in the issue delivered to the defendant, the date of the writ of summons was not stated in accordance with rule, H. T., 4 Will. 4, but in the writ of trial it was. The defendant took the objection before the Under-sheriff, who overruled it. The writ was amended, but the Court set it aside; because a party cannot be allowed to alter the proceedings as set forth in the issue of his own authority, but must have leave of the Court or a Judge.

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Watts *v.* Ball, E. T. 1840. C. P. 8 *D. P. C.* 589.

A variance, as to the date and year, between the issue and writ of trial, may be amended.

On motion to amend, it appeared that the copy of the issue did not agree with the writ of trial in the statement of the date and year. The Court allowed the amendment on payment of costs, as it was a mistake in a part of the proceedings of the least possible consequence.

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Farwig *v.* Cockerton, H. T. 1838. Ex. 3 *M. & W.* 169; S. C. 6 *D. P. C.* 337.

or, where the date of the writ of summons is wholly omitted.

This cause had been tried before the Secondary, before whom it was objected, on the part of the defendant, that the writ of trial and issue did not correspond, the former omitting the date of the writ of summons. The cause was tried in opposition to the defendant's protest. After verdict for the plaintiff, *Parke,* B., made an order to amend the writ of trial; and the Court, on a motion to rescind it, held, that under stat. 2 Will. 4, c. 39, giving the general form, and empowering the Court or a Judge to amend in case of non-compliance, the order was rightly made.

*See Cox* v. *Painter,* 1 *W. W. & D.* 228; *and* 5 *D. P. C.* 463.

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Sherman *v.* Tinsley, H. T. 1837. C. P. 4 *Scott,* 286.

If a cause be tried before the Sheriff after return of the writ of trial, the latter may be amended.

A cause had been made a remanet. An order was afterwards obtained to try before the Sheriff; and the trial took place on the day after the return-day of the writ of trial. On motion to set aside the proceedings on that ground; it was stated the defendant had appeared and defended.

*Per Cur.*—By defendant's appearance the objection is waived. Besides, if necessary, we should allow the writ to be amended, by altering its return.

PERCIVAL *v.* CONNELL, T. T. 1837. C. P. 5 *Scott*, 91; S. C. 6 *D. P. C.* 68; 3 *Bing.* 877.

So, a misrecital of the day of the writ of summons in a writ of trial.

THE date of the writ of summons was the 22nd June, 1836, whilst the writ of trial alleged the date to be the 6th July. The objection was known at the trial, was mentioned, but not insisted on; the cause proceeded, and the plaintiff obtained a verdict. The Court would not set aside the writ of trial for such defect; but ordered the rule to be suspended until the plaintiff obtained leave to amend the writ of trial, he paying the costs of the application to the Court.

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(*l*) OF AMENDING A WRIT OF INQUIRY*, AND SUGGESTIONS THEREON†.

JONES *v.* HARRIS, T. T. 1832. K. B. 1 *D. P. C.* 433.

If a suggestion on the roll be necessary, and not made by the plaintiff, the defendant may compel it by summons.

IN this action the plaintiff recovered only 1*l.* 18*s.*; and the defendant being entitled to costs under the Middlesex Court of Requests Act, applied for a rule to compel the plaintiff to deliver up the record, in order to enable the defendant to enter a suggestion on the roll. The plaintiff resisted the application, on the ground that his attorney had absconded.

*Sed per Williams*, J.—The rule must be made absolute. The plaintiff is answerable for the act of his attorney.

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(*m*) OF AMENDING THE JURY PROCESS‡.

ROGERS *v.* SMITH, T. T. 1834. K. B. 1 *Ad. & E.* 772; S. C. 3 *N. & M.* 760.

If there be no return of the distringas jura-

THIS was a writ of error brought by the original defendant, to obtain the reversal of a judgment in an action of assumpsit, on the ground that the writ of distringas juratores was not returned, and

* The Court will amend a writ of inquiry by the award of it upon the roll. (*Johnson* v. *Toulmin*, 4 East, 173; *Poppet* v. *Hearn*, 1 D. & R. 266).

† In actions upon bonds for the non-performance of covenants or agreements, in which it is compulsory on the plaintiff to assign breaches, he is allowed to suggest them on making up the issue, and assess damages on the trial of the issue; (See 5 M. & S. 60); if, however, the issue has been inadvertently made up, and delivered without a suggestion, the proper course is, to obtain a Judge's order, upon summons, for leave to deliver a second issue, with a suggestion; but if the latter be delivered without such order, the proceeding will be irregular. (8 T. R. 255).

In *Bale* v. *Hodgetts*, 1 Bing. 182, the Court amended an inquisition by adding damages, where the addition was necessary to entitle the plaintiff to costs, namely, in debt for the single value of tithes.

‡ The Court may amend the jury process at any time for defects arising from the misprision of the clerks. (8 H. 6, c. 12). The distringas may be amended by the venire, and the venire by the award of it on the roll. When the Sheriff's return to the distringas has not been indorsed, the record may be withdrawn and the indorsement made, and the cause re-entered. (*Patteson*, J.—*Masters* v. *Lewis*, 1836, N. P., 2 M. & Rob.. 59).

All formal defects in the jury process are aided by verdict. (See the 21 Jac. 1, c. 13; M. 2 Salk. 454, and Lord Raym. 1143; 1 Stra., 136; 2 Id. 1214.

Except in trials at bar, the writ of venire facias juratores may be tested on the day on which the issues are made, returnable forthwith; and the writ of distringas juratores, or habeas corpora juratorum, may be tested on any day subsequent to the teste of the writ of venire, whether in term or vacation, (3 & 4 Will. 4, c. 67); and if it is found necessary to amend the day of the teste and return of the dis-

that no panel of the jurors was annexed to the writ. It was argued, on the part of the plaintiff in error, that the defect was matter of error at common law, and that it was not cured by any of the statutes of jeofails. It was contended for the defendant in error, that the want of a return was cured, by 18 Eliz. c. 44, or by 21 Jac. 1, c. 13, and that no panel was requisite prior to the 3 Geo. 2, c. 25, s. 8. But after *Cur. adv. vult*—

tores, nor any panel returned and annexed thereto, it is fatal on a writ of error.

*Per Cur.*—We must reverse the judgment below; because there must be either a return to the distringas juratores, or the panel of the jurors annexed thereunto must be returned.

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### (*n*) Of amending the nisi prius record.

Wells *v.* Day, M. T. 1838. Q. B. 8 *A. & E.* 941.

After notice of trial given, the cause was made a remanet. In the next term it was tried; and after the trial it was discovered that no Judge's order had been obtained to amend the jury process or Nisi Prius record in the teste and return.

When it is not necessary to repass the record, a Judge's order is not required to amend the teste and day of return of the distringas.

*Sed per Cur.*—The record in this case cannot be objected to as being altered, because no Judge's order was requisite. The rule requiring a Judge's order before such amendments can be made, only applies to cases where it would be necessary to repass the record. Here there was no occasion to do so.

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### (*o*) Of amendments immediately before trial*.

tringas or habeas corpora, or of the clause of Nisi Prius, the order of a Judge may be obtained to authorize the amendment, and in such case it may be granted ex parte.

* The 5th sect. of 1 Geo. 4, c. 55, recites 'that it is expedient that the Justices of the Courts of King's Bench and Common Pleas, and the barons of the Exchequer at Westminster, and the Justices of Chester, should have power and authority, upon their respective circuits for taking the assizes, to grant summonses and to make orders in actions and prosecutions, in the manner hereinafter mentioned.' Be it therefore enacted, "That, from and after the passing of this act, it shall and may be lawful for the Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer at Westminster, and the Justices of Chester, and each and every, or any one of them, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders, in all actions and prosecutions which are or shall be depending in any of his Majesty's Courts of Record at Westminster, in which the issue, if brought to trial, would be to be tried upon such their respective circuits, as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer and Justices of Chester, were respectively Judges of the Court in which such actions or prosecutions are or shall be depending, although such respective Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, and Justices of Chester, or any of them, may not be Judges of the Court in which such actions or prosecutions are or shall be depending; and such summonses and orders shall be of the same force and effect as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer at Westminster, and Justices of Chester, were respectively Judges of the Court in which such actions or prosecutions are or shall be depending."

Immediately before the trial, and after the cause was called on, the Judge refused to increase the term of the demise in an ejectment, (*Doe* v. *Hay*, H. T. 1833, N. P., 1 M. & Rob. 243), or to insert the parish and county. (*Doe* d. *Lewis* v. *Coles*, H. T. 1826, N. P., R. & M. 380).

Before this act, when there was a variance between the pleadings and the evi-

REX *v.* DAVIS, 1824. N. P. 1 *C. & P.* 470.

The caption of an indictment may be amended*.

IN the caption of the indictment, as stated in the Nisi Prius record, the names of the grand jurors who found the bill were not set out; but it was only stated that by the oath of twelve good and lawful men, sworn and charged to inquire &c., it was presented &c.

*Park*, J.—As the caption may be amended, if it be wrong, I shall not stop the case on such an objection.

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HEAD *v.* SMART, H. T. 1828. K. B. *Chit. Stat.* 735.

Under 1 Geo. 4, c. 55, special counts upon terms were allowed to be added immediately before the trial.

IMMEDIATELY before trial Lord *Tenterden* allowed several special counts, on bills alleged to have been paid supra protest, to be added to a declaration, upon the terms that, if the Court thereafter should be of opinion that the plaintiff could not have recovered upon the common counts, the defendant should have the costs up to the time of the trial, the plaintiff taking his verdict upon the special counts.

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2nd.—AT THE TRIAL†.

(*a*) OF VARIANCES UNDER 9 Geo. 4, c. 15‡.

BROOKS *v.* BLANSHARD, T. T. 1833. Ex. 1 *C. & M.* 779; S.C. 3 *Tyrw.* 446.

Under the 9 Geo. 4, c. 15, a Judge had no authority to amend, where no matter in writing, or in print, was ad-

ACTION for a libel. The libel set out upon the record, imputed to the plaintiff "mismanagement or ignorance." The evidence was, that the expression in the libel (which had been destroyed) was "ignorance or inattention." The Court held the variance fatal, and that where no matter in print or writing is produced in evidence, a Judge at Nisi Prius had no power, under 9 Geo. 4, c. 15, to amend the record from the real testimony of witnesses called to speak to

dence of a written document, it was held, that the Judge about to try the cause could not order an amendment, unless he were a Judge of the Court in which the action was depending; (*Halhead* v. *Abrahams*, 3 Taunt. 81; and see 6 Bing. 596); and, consequently, in such a case the plaintiff was compelled to withdraw his record or submit to a nonsuit: this defect in the law is now aided by the above and subsequent enactments.

* A plea in abatement in a criminal proceeding is not amendable. (*Rex* v. *Cooke*, 2 B. & C. 871; S. C. 4 D. & R. 592).

† The amendment must be made before the verdict is pronounced, and the judge cannot give leave to amend at a future day. (*Brashier* v. *Jackson*, M. T. 1839, Ex., 6 M. & W. 549; S. C. 8 D. P. C. 784).

‡ This act provides, that it shall and may be lawful for every Court of record holding pleas in civil actions, any Judge sitting at Nisi Prius, and any Court of oyer and terminer, and general gaol delivery in England and Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or Judge shall see fit to do so, to cause the record on which any trial may be pending before any such Judge or Court, in any civil action, or on any indictment or information for any misdemeanor, when *any variance shall appear between any matter in writing or in print*, produced in evidence, and the recital or setting forth thereof upon the record, whereon the trial is pending, to be forthwith amended in such particular, by some officer of the Court, on payment of such costs, if any, to the other party, as such Judge or Court shall think reasonable, and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned, together with the record, and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly.

the contents of a written document which had been destroyed, and which contents, on their evidence, appear to be materially different from the statement of the document upon the record.

duced in evidence*.

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BROOKS *v.* BLANSHARD, T. T. 1833. Ex. 1 *C. & M.* 779; S. C. 3 *Tyrw.* 846.

THE plaintiff, who had filled the situation of engineer in superintending the works of a railway company, of which the defendant and one L. were commissioners, became a candidate for the appointment of engineer to another undertaking, in which L. was also a commissioner. The defendant, who did not know L. was a commissioner, wrote to him, recommending one B. as a candidate; in reply to which he received a letter, stating that another person had been elected. He then wrote another letter to L. upon the subject of the railway, containing libellous matter in respect of the plaintiff's conduct when in the situation of engineer to the Company; and in consequence of that letter being shewn, the plaintiff was unsuccessful at a subsequent election. The letter was not produced, and parol evidence was given of the contents; and there being a variance between the oral testimony and the declaration, the Court held, that a Judge at Nisi Prius has no authority, under 9 Geo. 4, c. 15, to amend a record, setting forth the contents of a written document which has been destroyed, from the oral testimony of witnesses called to prove those contents.

Hence, where a libel is proved by parol, the libel itself being destroyed, and the proofs substantially different from the matter stated in the declaration, it cannot be amended;

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BRIANT *v.* EICKE, T. T. 1829. N. P. 1 *M. & M.* 359.

A JUDGMENT was stated on the record, by mistake, of a wrong Court.—Held, that the examined copy was a matter in writing produced in evidence within the stat. 9 Geo. 4, c. 15, s. 15; and that the Judge might, under the authority of that act, order the record to be amended.

but an office copy of a judgment was held to be such a matter in writing.

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MASTERMAN *v.* JUDSON, H. T. 1832. C. P. 1 *M. & Scott,* 367; S. C. 8 *Bing.* 224.

IN case against a witness for not obeying a subpœna, the declaration, after stating that the writ of subpœna was issued in the cause, proceeded to aver, "That the plaintiffs caused the said writ to be made known and shewn to the defendant, and caused a copy to be left with him." Upon the trial it appeared that there was a variance between the copy, or ticket as it was usually termed, which had been left with the witness, and the original writ of subpœna; the former purporting to be addressed to the defendant and John Doe alone, whereas the original subpœna, when produced, appeared to be addressed not only to the defendant, but also to two other real persons. Upon application of the plaintiffs, the Judge who tried the cause at Nisi Prius, ordered an amendment to be made in these words, "Caused a copy of so much of the said writ of subpœna as related

So, in an action for not obeying a subpœna, where only part is set out, the declaration may be amended by setting out the whole.

* But a declaration might be amended, though it did not appear from the statement in the pleadings, that the contract was in writing, if it were so in fact. (*Lamey* v. *Bishop*, H. T. 1833, K. B., 4 B. & Ad. 479; S. C. 1 N. & M. 332; Abridg. Post, p. 182; S. P. *Masterman* v. *Judson*, H. T. 1832, 8 Bing. 224; Semble overruling *Ryder* v. *Malbon*, 1829, N. P., 3 C. & P. 595).

to the defendant to be left with him." The trial then proceeded on the amended declaration, and a verdict was found for the plaintiffs.

And *per Cur.*—Under 9 Geo. 4, c. 15, we think such amendment falls within the meaning and construction of the act, and is fully authorized by the same.

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PARKER *v.* ADE, H. T. 1833. 1 *D. P. C.* 643.

Misdescription as to whom a bill of exchange was payable,

IN an action on a bill of exchange by indorsee against indorser, the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to A. B.; whereas it appeared in evidence to have been drawn in favour of A. B. The Judge allowed the record to be amended.

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BENTZING *v.* SCOTT, T. T. 1839. N. P. 4 *C. & P.* 24—S. P. BECKETT *v.* DUTTON, M. T. 1840. Ex. 1 *H. & W.* 1.

or a mistake as to date of the bill,

ACTION on bill of exchange. Declaration described it as dated 26th March, the instrument being really dated the 29th. The cause was undefended, but Justice *J. Parke* permitted the error to be rectified.

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LAMEY *v.* BISHOP, H. T. 1833. K. B. 4 *B. & Ad.* 479; S. C. 1 *N. & M.* 332.

or in describing terms of contract to pay on a certain day instead of before that day—amendable.

THE declaration stated, that, "in consideration that the plaintiff would sell to the defendant certain stock of the plaintiff, to be paid for by approved bills falling due before the 15th day of February, 1832;" but did not aver the contract to be in writing. When the contract was produced in evidence, it appeared that the stock was to be paid for by approved bills falling due by the 15th day of February, 1832.

It was objected, on the part of the defendant, that the contract set out in the declaration varied from that produced, inasmuch as, by the former, the bills of exchange were to become due before the 15th February, 1832; but by the terms of the latter the bills were to become due by the 15th February, 1832. Upon this the declaration was amended by the direction of Lord *Denman*, C. J., and in pursuance of 9 Geo. 4, c, 15, by substituting the word "by" for the word "before" where it was necessary.

*Per Cur.*—In the case of *Masterman* v. *Judson*, 8 Bing. 224, the Court of Common Pleas decided that a Judge at Nisi Prius has power to make such an alteration.

*See Webb* v. *Hill*, 1 *M. & M.* 253.

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BROWN *v.* DEAN, M. T. 1833, K. B. 2 *N. & M.* 323.

Though it has been held that an amendment should not be allowed when doubtful as to whether document correctly described on record or not.

A. BEING arrested at the suit of B., upon a writ indorsed, oath for 76*l.*, C. writes that, in consideration of B.'s instantly discharging A., he will give his promissory note to B. for 10*s.* in the pound upon the debt on the arrival of the discharge. This engagement was declared upon as a promise to pay 10*s.* in the pound upon the debt for which he was arrested. An amendment was made.

*Per Denman*, C. J.—I should not have amended, I think, in this case; because the question as to whether the agreement was well stated, would have been the result of a long argument. I

should only amend where there was some obvious error in setting out the instrument.

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JELF *v.* ORIEL, T. T. 1829. N. P. 4 *C. & P.* 22—S. P. REEVES *v.* SCOTT, 1 *Chit. Pl.* 349, *5th Ed.*

ACTION against drawer of a bill of exchange. The declaration stated that the bill was accepted by Lord Audley, "payable at Sir James Esdaile & Co.'s, bankers, London, or at No. 18, Poland-street, Oxford-street." The witness who proved the acceptance to be Lord Audley's handwriting stated that the words "or at No. 18, Poland-street, Oxford-street," were not of his lordship's handwriting. On application to amend—

Nor an error, which common care could have avoided*.

Lord *Tenterden*, C. J. said—The object of that act of Parliament was to prevent a failure of justice from accidental errors. Now this is a blunder which no man could make who would but use his eyesight.

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PALMER *v.* GRAND JUNCTION RAILWAY, H. T. 1839. Ex. 7 *D. P. C.* 232.

IN an action on the case, the declaration stated that the defendants were the owners of a certain railway and of certain engines and carriages for the conveyance of passengers, cattle, goods, &c.; that the plaintiff caused to be delivered to the defendants certain horses, to be safely and securely carried and conveyed by the said railway from Liverpool to Birmingham, and then to be delivered to the plaintiffs. Breach:—The defendants took so little care about carrying and conveying the horses of the plaintiff, that the carriages containing them were thrown off the railway and down an embankment, and one of the *horses was killed*, and the residue greatly injured, &c. There was contradictory evidence, and the plaintiff had a verdict; but the defendant had leave to move to enter a nonsuit. On motion for that purpose, it was contended the evidence did not support the declaration in its present form.

Under 9 Geo. 4, c. 15, any objection to the form of the declaration ought to be taken at the close of the plaintiff's case, so that it may be amended at the trial, as the Court in banc, will not afterwards entertain the objection;

*Sed per Parke*, B.—If this objection had been taken at the close of the plaintiff's case, the declaration would have been amended. The only objection made was to the reception of evidence, and not to the form of the declaration.

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BERNEY *v.* GREEN, M. T. 1826. C. P. 12 *Moore*, 174.

THE declaration was upon a special agreement; the issue, however, varied from the record, the record being consistent with the agreement, but not with the issue. It appeared that a summons had been taken out to amend the declaration; that the plaintiff's attorney said he wished to examine the issue with the record; but that the alteration was not then pointed out, and that the summons was discharged. After verdict on motion to set it aside, on the ground of variance—

nor could they on the ground of variance.

* As, where a declaration for a malicious arrest stated the termination of the suit to be a judgment of non pros. instead of a rule to discontinue, an amendment under 9 Geo. 4, c. 15, was refused; (Lord *Tenterden*, C. J.—*Webb* v. *Hill*, M. T. 1828, N. P., 3 C. & P. 485); nor can, in an ejectment, the term of the demise be increased. (*Doe* d. *Manning* v. *Ray*, H. T. 1833, N. P., 1 M. & Rob. 243).

*Per Cur.*—A record at Nisi Prius ought not to differ from the declaration or issue delivered; and if it does, the Court, upon application, will set it right; and amendments are made, on payment of costs by the party applying to amend; this is the constant practice. But as the error was not then pointed out, the defendant now comes too late to seek to set aside the verdict.

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PARKS *v.* ADGE, H. T. 1833. Ex. 1 *C. & M.* 429; S. C. 1 *D. P. C.* 643—*Sed vide* PULLEN *v.* SEYMOUR, T. T. 1836. Ex. 5 *D. P. C.* 164.

Nor, under 9 Geo. 4, c. 15, could the Court revise an amendment made by a Judge at Nisi Prius.

IN an action on a bill of exchange by *Indorsee* v. *Indorser*, the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to A. B.; whereas, it appeared in evidence to have been drawn in favour of A. B. The Judge having amended the record, motion was made to the Court to revise that amendment.

*Sed per Cur.*—The 9 Geo. 4, c. 15, empowers the Judge at Nisi Prius to amend. Now, the question which has been raised is, whether the Judge exercised a sound discretion in altering the record according to the facts. We entertain great doubt whether it was not exclusively for the discretion of the Judge, and whether it is competent for this Court to revise the discretions of the Judge. No such power is given by the act.

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(*b*) OF VARIANCES UNDER 3 & 4 WILL. 4, c. 12 *.

WHITWILL *v.* SCHEER, T. T. 1838. K. B. 3 *N. & P.* 398; S. C. 8 *A. & E.* 301; S. P. CLARK *v.* MORRELL, M. T. 1840. C. P. 1 *Drink.* 4.

The stat. 3 & 4 Will. 4, c. 42, s.

BY a charter-party a ship was chartered to go to Constantinople for a cargo; and, by a memorandum, it was agreed that the vessel

* The 23rd section recites, 'that great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances as to some particular or particulars between the proof and the record, or the setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record; And whereas it is expedient to allow such amendments, as hereinafter mentioned, to be made on the trial of the cause.' Be it therefore enacted, "That it shall be lawful for any Court of Record holding plea in civil actions, and any Judge sitting at Nisi Prius, if such Court or Judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such Court or Judge in any civil action, or in any information in the nature of a quo warranto or proceedings on a mandamus, when any variance shall appear between the proof and the recital or the setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars, in the judgment of such Court or Judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement as such Court or Judge shall

should be addressed to Messrs. S. & Co., Odessa; and that if it did not arrive at Constantinople before a certain day, the defendant's agent should have the option of annulling the contract. The declaration upon this charter-party alleged, that the charterer promised that there should be some agent of Messrs. S. & Co. or himself at Constantinople to exercise the option, and that such option should be made within a reasonable time after notice of the ship's arrival to such agent. A breach of this promise was stated. At the trial the Judge was of opinion that no such promise was proved by the charter-party; but he allowed the declaration to be amended by the striking out of that promise and the substitution of a promise that the charterer or Messrs. S. & Co. would, within a reasonable time after the arrival of the ship at Constantinople and notice thereof given, give orders or exercise the option of annulling the contract.

23, does not apply merely to literal misdescriptions, but to erroneous statements of the legal effect of acts or contract*;

The Court held, that the Chief Justice was right in allowing the amendment: for although, if the promise alleged went beyond the obligations of the charter-party and in addition thereto, the variance might be fatal; yet it being merely a formal, though incorrect, statement of the legal effect of the instrument, it might be struck out altogether, and a correct representation of the legal effect given.

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HANBURY *v.* ELLA, E. T. 1834, K. B. 1 *A. & E.* 61; S. C. 3 *N. & M.* 438.

DECLARATION stated that the defendants, in consideration that the plaintiffs would supply E. with beer, promised the plaintiffs to

therefore declaration may be

think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such Court or Judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended, upon payment of costs to the other party and withdrawing the record, or postponing the trial as aforesaid, as such Court or Judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ; and thereupon such papers, rolls, and other records of the Court from which such record or writ issued as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any Court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had, provided that it shall be lawful for any party who is dissatisfied with the decision of such Judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the Court from which such record or writ issued, for a new trial upon that ground; and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet."

Sect. 24. "And be it further enacted, That the said Court or Judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and, thereupon, such finding shall be stated on such record or document; and, notwithstanding the finding on the issue joined, the said Court, or the Court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

* Where an amendment is made, it is no ground for a new trial, that there was in fact no variance where the merits of the action are not affected by the amendment. (*Clark* v. *Morrell*, M. T. 1840, C. P. 1 Drinkw. 4).

amended by describing defendant's promise to *guarantee*, instead of promise to *pay*.

pay them the amount of the beer so supplied. Another count stated an undertaking on the same consideration to be accountable and to pay &c. The proof was, that the defendants (by letter) undertook to guarantee to the plaintiffs the amount supplied.—The Court held, that, under 3 & 4 Will. 4, c. 42, s. 23, the Judge at Nisi Prius might amend the record by substituting the word guarantee for pay in the first count. And that, if such amendments were not permitted, there would be an end of the benefit of those new rules for pleading laid down by the Judges, which proceed on the assumption, that, by the said act of the 3 & 4 Will. 4, c. 42, s. 23, the powers of amendment at the trial in cases of variance in particulars not material to the merits of the case, are greatly enlarged.

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MOILLIET *v.* POWELL, H. T. 1834. N. P. 6 *C. & P.* 233.

Or a promissory note as a bill of exchange, and in such case an order for the admission of signatures may also be altered *.

DECLARATION described defendant as the maker of a bill of exchange; but, on the production of it, the instrument was clearly a promissory note. The order to admit the signatures also described the document as a bill of exchange. *Alderson*, B., allowed both to be amended; and the plaintiff had a verdict.

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HILL *v.* SALT, H. T. 1834. Ex. 2 *C. & M.* 420.

So, a misdescription in the amount of a penalty in a bond †,

THIS was an action of debt on bond. The declaration described the penal sum as 260*l.*; the bond, in evidence, being for 280*l.*, the Under-Sheriff allowed an amendment; and on a motion to set aside the verdict, the Court decided that the amendment was correctly made.

* So, where the declaration omitted the time at which the bill was payable, as "three months after date," it was holden it might be amended. (*Pullen* v. *Seymour*, T. T. 1836, Ex., 5 D. P. C. 164).

† So, where a corporation aggregate sued for use and occupation of "standings," market places, and sheds; and it appeared that they allowed the defendant to take tolls from others, the Judge permitted the word "tolls" to be inserted. (*Parke*, B.—*Mayor of Carmarthen* v. *Lewis*, 6 C. & P. 608). So, a mis-statement as to the parish in an ejectment, allowed, though action brought for a forfeiture. (*Doe* d. *Mariott* v. *Edwards*, H. T. 1834, N. P., 6 C. & P. 208; S. C. 1 M. & R. 319). So, in the name of a close, in trespass. (*Coleridge*, J.—*Howell* v. *Thomas*, 1836, N. P., 7 C. & P. 347). So, in action for fraudulent misrepresentation, where allegations substantially proved, the Judge allowed the statement of the representations to be amended. (*Mash* v. *Densham*, M. T. 1824, N. P., 1 M. & Rob. 442). So, amount in each count increased before cause called on, the particulars clearly shewing that the defendant must have known that the plaintiff would seek to recover the larger sum. (*Dew* v. *Katz*, M. T. 1837, N. P., 8 C. & P. 315). So, amendment allowed, where general warranty of a horse stated instead of a qualified contract as to an affection in one foot; (*Hemming* v. *Parry*, 1834, N. P., 6 C. & P. 580); but, in action for slander, Lord *Denman* refused, at the trial, to allow innuendos to be struck out, which clearly had no reference to the plaintiff. (*Prudhomme* v. *Fraser*. M. T. 1834, N. P., 1 M. & Rob. 435; S. C. 2 Ad. & E. 645). Nor allowed, if it appear probable that the variance may have prevented the defendant from pleading a good bar to the action. (*Ivey* v. *Young*, 1836, N. P., 1 M. & Rob. 545; S. C. 5 D. P. C. 450 not S. P.). In trespass for taking mirrors and handkerchiefs, the plea justified the latter taking, but omitted the former: Held, not to be a variance within the statute. (*John* v. *Currie*. 1834, N. P., 6 C. & P. 618).

SAINSBURY *v.* MATTHEWS, M. T. 1838. Ex. 4 *M. & W.* 343; S. C. 7 *D. P. C.* 23.

or a misdescription in the terms of a contract;

IN assumpsit the declaration stated the contract to be to deliver potatoes *within a reasonable time*, to be paid for on delivery. The contract produced in evidence was, that the defendant, in the month of June, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2*s.* per sack, the plaintiff to have them at digging-up time,—October.

The Judge at Nisi Prius having, on the application of the plaintiff, directed the declaration to be amended, so as to make it conformable with the contract as above stated, the Court refused a new trial, no affidavit being produced to shew that the defendant had been prejudiced by the amendment.

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BOYS *v.* ANCELL, E. T. 1839. C. P. 5 *Bing. N. S.* 390; S. C. 7 *Scott*, 364.

as where it was stated to be made between plaintiff and defendant, when there was also another party to it;

THE declaration alleged that an agreement was made by the plaintiff on the one part, and the defendant on the other, and the agreement proved was made between the plaintiff and the defendant and two others, his co-trustees.

And *per Cur.*—It is unnecessary to consider whether the variance is fatal or not, inasmuch as the Court feel at perfect liberty to amend; the amendment to be made not being material to the merits of the cause, nor prejudicial to the defendant in the conducting of his defence.

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GLADWELL *v.* STEGGALL, T. T. 1839. C. P. 8 *Scott*, 60.

and a misdescription of the party actually employing a surgeon, in a count against him for negligence—may be amended at the trial, upon payment of nominal costs.

DECLARATION in case for negligence, against the defendant as a surgeon, alleging that the plaintiff, at the request of the defendant, had employed the defendant to cure, &c., and that defendant accepted such employment, &c. At the trial it appeared that the defendant had been sent for to attend the plaintiff's husband by her father, and not by herself. It was objected that the retainer was misdescribed, and that the plaintiff ought to be nonsuited:—Leave was reserved to the Court to amend the declaration, which, on a subsequent application being made, the Court held might be done, had the allegations been material; but they were considered not to be so, although a distinct issue was taken by the defendant upon the retainer.

*See Pippin* v. *Sheppard*, 11 *Price*, 401.

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DUCKWORTH *v.* HARRISON, T. T. 1839, Ex. 5 *M. & W.* 427; S. C. 7 *D. P. C.* 463.

So, a declaration on an award may be amended, to make it agree with the submission;

IN an action on a submission to an arbitration, the declaration stated that the costs of the reference and award should abide the event; but the submission also provided for the costs of making the submission a rule of Court.—On the question of amendment, after verdict for the plaintiff with liberty to move to enter a nonsuit, the Court held, the declaration might be amended; observing the question is, whether or not there is any variance; and we are inclined to think there is, and that such variance would be fatal, unless we have the power of amendment. It seems to us, however, that this is a case

in which an amendment might have been made. In deciding this point, we are to ask ourselves, whether this is a matter material to the merits of the cause; and we say it is.

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ASHWORTH *v.* HEATHCOTE, E. T. 1830. C. P. 6 *Bing.* 596.

but after a cause is referred, no amendment can be made under this statute, as the cause is then out of Court.

AFTER a cause was referred by Judge's order, the Judge amended such order, directing a particular of set-off to be delivered. On motion to set it aside—

*Per Cur.*—This was a reference of a cause at Nisi Prius, that is, of the cause as it then stood, without any particular of set-off after a notice to deliver one, which is the same as if there had been no notice of set-off. After the reference, the Judge made an order that a particular of set-off might be delivered, which was virtually to put the defendant in a situation, circumstanced as the cause then was, in which he had no right to stand. The Judge could not remedy the defendant's neglect. In *Rawtree* v. *King*, 5 Moore, 167, the Court said they could not amend an order of *reference*, because the cause was out of Court.

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HILL *v.* SALT, H. T. 1834. Ex. 2 *C. & M.* 420.

The Sheriff has power, under this statute, to direct an amendment, as well as a Judge at Nisi Prius*.

IN this case an amendment had been directed to be made by the Under-Sheriff; and on its being objected that the Sheriff had not the power to make such an order under the 3 & 4 Will. 4, c. 42, s. 23. *Bayley*, B., said—If this case is not precisely within the language of the 23rd section, it is clearly within the spirit of it; and I therefore think that an amendment ought to have been made.

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PARRY *v.* FAIRHURST, E. T. 1835. Ex. 2 *C., M., & R.*, 190.

A Judge may, under the 3 & 4 Will. 4, c. 42, postpone the trial to a future day, to render a necessary amendment effectual.

DECLARATION in case charged the defendants with negligence as carriers. At the trial it appeared from the evidence that the defendants, if liable at all, were liable as wharfingers, on a special contract to forward; and during the summing up the plaintiff applied to the Judge to amend the declaration. He refused to amend; but left it to the jury to say whether it was a contract to forward, and they found that it was. He then directed the verdict to be entered for the defendants; but the special finding to be indorsed on the postea, that the Court might proceed thereon, according to the 3 & 4 Will. 4, c. 42, s. 24.

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GAYLOR *v.* FARRANT, H. T. 1838. C. P. 4 *Bing. N. S.* 286; S. C. 5 *Scott*, 701; S. C. 6 *D. P. C.* 426.

A party giving notice that he shall rely on a variance, and oppose an amendment†,

AVOWRY for rent in arrear, payable quarterly. The principal point in dispute was, whether 100*l.* or 115*l.* was due; the jury found the latter, and that the rent was payable half-yearly, not quarterly, as avowed for; and a verdict passed for the defendant. Previous to the trial the defendant's attorney had given notice that

* And if he does not exercise that power, the Court will direct a new trial. (*Higgins* v. *Nichols*, H. T. 1839, B. C., 7 D. P. C. 551).

† In *Doe* v. *Edwards*, 1 M. & Rob. 321. *Parke*, B., said, that in future, parties must not come down to trial on the ground that there is a variance which they suppose a Judge will not rectify; nor can amendments be refused on the ground that the action is bad or oppressive. (*Id.*)

if any variance should appear upon the trial between the contract of tenancy set out in the avowry and cognisance and the evidence adduced to support it, either as to the amount of rent reserved, or the days of payment of the rent, or otherwise, an application would be made at once to the Judge who presided, for leave to amend the avowry and cognisance to cure the variance, and for permission to proceed upon the trial as if no such amendment had been necessary. The plaintiff had served the defendant with counter-notice that the application to amend would be opposed. The Court held the case within the spirit of the act, and that the amendment should be allowed.

will not prevent the Judge from making an amendment if otherwise proper.

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WARD *v.* PEARSON, E. T. 1839. Ex. 5 *M. & W.* 16; S. C. 7 *D. P. C.* 382.

THE contract was, that the defendant was to erect certain seats or tables for 25*l.*, to be completed four or five days before the coronation. The declaration alleged that the defendant contracted with the plaintiff to build for him a certain room, booth, or building, to certain plans then agreed on for the sum of 20*l.*; the same to be erected by the 28th June.

On motion to amend at the trial, Lord *Abinger*, C. B., allowed the amendment. On application for a new trial, on the ground that the amendment should not have been allowed, the Court refused the rule, saying—"If we were to hold this amendment wrong, a party would be turned round upon a mere variance of words."

But where an amendment has been made at the trial, no new trial will be granted on that ground;

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DOE *d.* POOLE *v.* ERRINGTON, T. T. 1834. K. B. 1 *Ad. & E.* 750; S. C. 3 *N. & M.* 646; S. C. 1 *M. & Rob.* 343—BERNEY *v.* GREEN, M. T. 1826. C. P. 12 *Moore*, 174.

A DECLARATION in ejectment laid a joint demise by A. and B. The evidence proved A. and B. were tenants in common. On application to the Judge at Nisi Prius, under 3 & 4 Will. 4, c. 42, to have the record amended, by inserting several demises or striking out the name of one of the lessors, he refused to amend, saying, that he considered that the nature of the lessor's title was a question affecting the merits of the case; and the plaintiff was nonsuited.

On motion to set the nonsuit aside, the Court were of opinion that the propriety of the Judge's refusal to amend the record at Nisi Prius could not be now discussed.

nor where a Judge, at Nisi Prius, refuses to grant the application;

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SAINSBURY *v.* MATTHEWS, M. T. 1838. Ex. 4 *M. & W.* 343.

THE declaration stated a contract for the sale of potatoes to be, that "the potatoes were to be dug up within a reasonable time;" and it appeared in evidence that the contract was, that "they were to be dug up at the usual digging-time, the plaintiff to provide diggers for himself;" and that he had sent men for that purpose, whom the defendant refused to allow to dig the potatoes. The Judge at Nisi Prius having amended the record under the 3 & 4 Will. 4, c. 42, s. 23, the Court held that he was right in so doing, and refused to interfere, unless the defendant would prove by affidavit, that, in consequence of the mis-statement in the declaration, he had been misled in his defence.

and, if made, the Court will not afterwards interfere, unless defendant has been misled.

(*c*) Of formal amendments, not being variances.

Cox *v.* Painter, E. T. 1837. K. B. 1 *N. & P.* 581; S. C. 7 *C. & P.* 767; S. C. 6 *A. & E.* 491.

Under 3 & 4 Will. 4, date of writ of summons, when omitted, may be inserted in the record*.

On examining the Nisi Prius record, there did not appear to be any date stated to the writ of summons. On application to the Judge to amend, it was contended that he had no power, under the 3 & 4 Will. 4, c. 42, s. 23, to amend, as this was not a variance, but an omission on the record. His Lordship doubted his power to amend; but stated, as he had made such an amendment once before, and it had not been appealed against, he would amend; and he called for the production of the writ itself, on which the date appeared.

*Per Cur.*—The power of amending is clearly given by the rule H. T. 4 Will. 4. The authority is not confined to any particular stage of the proceedings.

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3rd—After Trial and before Final Judgment.

(*a*) Of the verdict and nisi prius record.

Ernest *v.* Brown, H. T. 1838. C. P. 4 *Bing. N. S.* 162.

A verdict may be amended according to the actual finding of the jury.

In an action for work and labour, the evidence was very contradictory, whether the work was done gratuitously or not; there was a second count for goods sold; and one on an account stated. Upon the count for goods sold defendant paid a small sum into Court. The jury found a verdict for the plaintiff for 1*s.*, which was entered on the postea generally.

On a question as to costs, the Court said, "The question is, how the verdict is to be entered; and, looking at the facts of the case, it is impossible not to see that the jury negatived the plaintiff's right of action on the first and third counts. The verdict is merely for nominal damages, and no man of common sense can apply the 1*s.* otherwise than to the second count. We are not precluded from

* And the similiter may be added, the jury being resworn, (*Dyson* v. *Warris*, 1835, N. P., 1 M. & Rob. 474, see 6 C. & P. 551); and a plea concluding to the country, with an &c., is sufficient without introducing a formal similiter on the record. (*Park*, J.—*Clark* v. *Nicholson*, 6 C. & P. 712). Where the issue contained an &c. after the replication, and no similiter was added, but it was correctly inserted in the Nisi Prius record:—Held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and rule in arrest of judgment discharged, (*Brook* v. *Finch*, H. T. 1837, B. C., 6 D. P. C. 313). But where there is no replication on the record, the Judge will not at the assizes allow one to be added without the consent of the defendant; (*Rowlinson* v. *Roantre*, 6 C. & P. 551); but a count for goods sold was permitted to be added to the record, which was in the declaration and issue, but not copied into the Nisi Prius record. (*Ernest* v. *Brown*, 2 M. & Rob. 13).

A Judge, it has been held, has no power at Nisi Prius to order an amendment of the award of venire facias on the Nisi Prius record. (*Bolland*, B.—*Adams* v. *Power*, M. T. 1835, N. P., 7 C. & P. 76). Though an indorsement on distringas of its execution by the Sheriff has been allowed, and the record re-entered. (*Masters* v. *Lewis*, 2 M. & Rob. 59).

On an action of covenant to pay a sum on a specified day, with interest: Held, that the party could not recover for interest after that period beyond the damages laid in the declaration, nor could the declaration be amended by inserting larger damages to cover the sum due. (*Watkins* v. *Morgan*, M. T. 1834, N. P., 6 C. & P. 661).

advancing justice by correcting a mistake in entering the verdict of the jury. We certainly cannot alter the verdict against the intention of the jury; but here we answer, and we think from the clearest evidence, that we are only giving effect to that intention. We think the record should be amended."

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SALTER *v.* SLADE, T. T. 1834. K. B. 3 *N. & M.* 717.

It is questionable whether an inferior Court of record can, after verdict, amend the pleadings.

IN assumpsit the declaration did not state that the debt arose within the jurisdiction; but alleged that the defendant was indebted within the jurisdiction, and that the promise was made there.

On a writ of error, it was said, that in Bacon's Abridgment, "Amendment," (G) it is thus laid down:—The inferior Court, when the record is returned, whether it be by the Common Pleas, or another Court of record, may amend after judgment, as well after as before a writ of error brought; and the rule of such amendment is to be certified by the clerk of such inferior Court to the superior: for though the record is removed by writ of error, and a mittimus recordum is entered on the roll; yet the writ of error is to send the record in the state and condition in which it ought to be by law, and that is corrected from all misprisions of clerks.

On the other side it was contended, that in Com. Dig. it is laid down that no amendment shall be after verdict, where the amendment alters the issue tried, or subjects the jury to an attaint. And the Court below, at all events, could not make this amendment; because the statute of amendments cannot apply to inferior Courts; and the Court gave no opinion on that point.

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CHAMBERS *v.* BERNASCONI, E. T. 1831. Ex. 1 *C. & J.* 459; S. C. 1 *Tyrw.* 344.

After verdict, the Court refused leave to strike out the general issue, in order to enable the defendant to begin.

THE defendant had pleaded the general issue and bankruptcy; and after trial, and verdict for the plaintiff, and rule for new trial, the Court refused to allow the defendant to amend by striking out the general issue, for the sake of giving him the right of beginning and of reply on the second trial.

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SANDERSON *v.* PIPER, T. T. 1839. C. P. 7 *D. P. C.* 632; S. C. 5 *Bing. N. S.* 561; 7 *Scott*, 418.

In an action on a bill of exchange, where the sum was stated in one part 245*l.* and in the other 200*l.*, Court allowed amendment;

IN an action on a bill of exchange, the declaration in figures expressed the bill to be for 245*l.*, but in the body it appeared to be for 200*l.* only. A verdict was returned for the plaintiff for 245*l.*, subject to the opinion of the Court upon a special case. And the Court, upon argument, held, 1st, That the plaintiff was entitled to 200*l.*; and 2ndly, That it was a case in which the Court would have amended the declaration at Nisi Prius, and in which therefore a nonsuit should not be entered.

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GUEST *v.* ELWES, T. T. 1837. K. B. 2 *N. & P.* 230.

and where the facts are specially found, the

THIS was an action on the case against the Sheriff. The declaration contained one count for an escape. The evidence shewed not an escape, but that the officer omitted to arrest the party. The

Court has no power to amend;

plaintiff's counsel applied for leave to amend, which the Judge refused; but permitted the trial to go on, with proof of the negligence as stated, and directed that the fact, when found by the jury, should be indorsed on the record.

On motion to the Court for that purpose, the Court held, they had no power to amend a record, under 3 & 4 Will. 4, c. 42, s. 24, where the jury has been directed to find the facts specially.

And *per Patteson*, J.—In *Parry* v. *Fairhurst*, 2 C., M., & R., 190, the Court of Exchequer did amend the record, and sent the case back for trial; but the power of the Court to amend does not appear to have been discussed.

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SERJEANT *v.* CHAFY, T. T. 1836. K. B. 5 *A. & E.* 354.

nor will they interfere where the party has refused to make the amendment before verdict.

IN replevin the defendant avowed for rent arrear on a demise, at an annual rent of 65*0l.* Plea, non tenuit; the plaintiff gave evidence that the rent was only 50*0l.*; and the defendant, before verdict, refused to amend. The jury found for the plaintiff, and found specially that the rent was 50*0l.*; and this verdict was indorsed on the record. On motion to amend, and a new trial—

*Per Cur.*—The jury have decided that the rent is a smaller sum than that avowed for, upon which the plaintiff asks for a new trial, in order that he may go down with an amended avowry. Perhaps, in some cases that might be allowed. But it appears here that the contest between the parties was, which was the rent, 65*0l* or 50*0l.*; and the plaintiff, with full knowledge of the facts, chose to claim the higher sum, and did not apply to the Judge for leave to amend; which would have been granted if the Judge had thought that a proper course. We cannot interfere.

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REEDER *v.* BLOOM, M. T. 1824. C. P. 2 *Bing.* 384; S. C. 9 *Moore*, 741.

Nisi Prius record may be amended after verdict by the insertion of the similiter*.

THE Nisi Prius record had been erroneously made up, without adding a similiter to the pleas which concluded to the country. The jury found a general verdict. After a rule had been obtained to stay proceedings, as being irregular for want of a *similiter*, (6 Moore, 51; 3 B. & B. 1; 2 Moore, 215); a rule to amend, by adding the similiter, was moved for, and both rules came on together.

*Per Cur.*—There might have been some difficulty if the plaintiff had not obtained a rule to amend; but, independently of authority, the justice of the case is with him. Both parties were to blame and went down to trial as if there had been a perfect record. If an application to add the similiter had been made at Nisi Prius, the Judge who tried the cause would have allowed it to have been done; and, in *Grundy* v. *Mell*, 1 N. R. 28, a similar application to the present was allowed for amending the record; and, according to a note of Mr. Serjeant Williams, in 2 Saund. 319, a defect of this description may be remedied at any time.

*See* 6 *C. & P.* 217, 551, 712.

* A judgment may be amended in the same term in which it is given. (*Darling* v. *Gurney*, T. T. 1833, Ex., 2 D. P. C. 101).

(*b*) After nonsuit.

Laythoarp *v.* Bryant, H. T. 1835. C. P. 1 *Scott*, 338.

After argument and rule absolute for a nonsuit, the pleadings may, under special circumstances, be amended.

In an action of assumpsit for not completing a purchase on a sale by auction, it appeared that the sale had been of an unexpired term, granted by a lease, of which the plaintiff was assignee. One of the conditions proved was, that the purchaser should not require the production of any title prior to the lease. The defendant was the highest bidder; but on the abstract being delivered to him, he immediately returned it, saying, that he had merely bid at the request of the vendor. The declaration stated that the plaintiff was possessed of a certain lease describing it. There was no evidence to support the allegation by proof of the lease in the ordinary way, viz. calling the attesting witness. The plaintiff was nonsuited. And after argument of the rule to set it aside, and the Court had expressed their opinion against the rule, application was made for leave to amend; and the case of *Atkinson* v. *Bell*, 8 B. & C. 277; 2 M. & R. 292, was relied on, where, in an action for goods bargained and sold, the plaintiff having been nonsuited, on the ground that the proper form of declaring under the particular circumstances of the case was for the breach of contract in not accepting the goods, the Court, after argument of a rule for setting aside the nonsuit, and entering a verdict for the plaintiffs, allowed them to have a new trial, with liberty to add such a count to the declaration. The Court, on the authority of this case, assented to the amendment.

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(*c*) Of the postea.

Roe *d.* Blair *v.* Street, M. T. 1834. K. B. 4 *N. & M.* 42; S. C. 2 *Ad. & E.* 329.

If a verdict be set aside as to one of two defendants in ejectment, the postea cannot be amended so as to support it against the other;

In ejectment against S. & T., for different parts of the premises in the declaration of ejectment, it was essential to prove a demand of the premises. A demand was proved as against S., but not a sufficient one against T. A verdict being taken against S., a verdict was also taken against T., subject to the opinion of the Court; but the Court set aside the verdict against T.; and after unsuccessful applications to *Taunton*, J. and *Tindal*, C. J., at Chambers, a rule nisi for amending the postea, by confining it to the premises in S.'s occupation, was granted. But the Court refused to make it absolute, and observed, if the lessor confines the execution of the writ of possession to the premises in S.'s occupation, good and well; but as no authority has been cited for this application, and it is quite a novel one, we discharge the rule.

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Reece *v.* Lee, T. T. 1822. C. P. 7 *Moore*, 269.

nor, after a general verdict, can the postea be amended by making it applicable to a

The first count of a declaration in trespass stated that the defendant, with force and arms, &c. struck and destroyed an iron scraper of the plaintiff's, affixed to his house, and also assaulted him; and the second count alleged that the defendant destroyed the scraper, without stating it to have been fixed to the freehold. The

particular count so as to deprive the plaintiff of costs.

jury found a general verdict for the plaintiff, with two shillings damages. On motion to amend—

The Court held, that as the jury had found a general verdict for the plaintiff, with two shillings damages, he was entitled to full costs; and the Court refused to amend the postea, by entering a verdict for the defendant on the first count.

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BARRATT *v.* COLLINS, E. T. 1825. C. P. 10 *Moore*, 446, 452, *n.*

But the Court allowed the postea to be amended in a *joint* action for malicious arrest, where the judgment might have been arrested.

AN action was brought, and a verdict obtained, by two plaintiffs against a defendant for a malicious arrest, the declaration alleging, by way of special damage, the false imprisonment of both, as well as the expenses incurred by them; the jury having, by their verdict, confined the damages to the expenses, which the plaintiffs had been jointly put to in procuring their liberty—

A motion was made in arrest of judgment. The Court made the rule absolute; but afterwards said, that a distinction is taken in 2 Wms. Saunders, 169, n. 1, that, in covenant against an apprentice for leaving his master's service before his time, whereby the plaintiff lost his service for the said term, which was not then expired, the plaintiff demurred: and Mr. Justice *Twysden* said, that though it had been adjudged to be naught after verdict; yet, being on demurrer, it might be helped, for the plaintiff might take damages for the departure from the service only, and not for the loss of service during the term; and then it would be well enough. So here, as the jury have confined the damages to the expenses incurred by the plaintiffs in procuring their discharge from imprisonment, the postea may be amended in that respect.

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HENLY *v.* MAYOR OF LYME REGIS, T. T. 1828. C. P. 5 *Bing.* 91.

Though after verdict on two counts, by consent the postea may be amended, by making it applicable to one only.

A VERDICT having been taken at the trial, by consent, on two counts of the declaration, both containing in substance the same cause of action; on motion to enter a verdict on the first count only, it was contended, that although it is usual to apply to the Judge who tried the cause, for his concurrence, yet the Court alone has authority to apply the verdict to any particular count. Where various counts disclose the same cause of action, the verdict may be entered on any one to which the evidence applies.

And *per Cur.*—By agreement entered into at the trial of the cause, the verdict was then taken upon the two first counts. Looking at this agreement, we think we are not precluded from allowing the plaintiff to enter up judgment on the first count. If, indeed, on the second count, damages might have been given which could not have been given on the first count, we should not, perhaps, without the concurrence of the Judge who presided at the trial, grant the application; but it appears that both these counts disclose precisely the same cause of action. They only set it out rather differently in form. We therefore think, that, by allowing this motion, we shall give effect to the agreement of the parties.

EMPSON *v.* GRIFFIN, M. T. 1839. K. B. 3 *P. & D.* 160.

A declaration contained a good count and a bad one; the evidence applied to both, and the jury gave general damages:—Held, that the postea could not be amended by confining the verdict to the good count.

THE declaration consisted of several counts, some good and others bad. The jury found a verdict, with damages for the plaintiff, generally. After the trial, on application, *Park*, J., without the defendant's consent, ordered that the verdict should be entered for the plaintiff on the good counts only, and for the defendant on the bad counts. On motion to set aside the order—

*Per Cur.*—The order must be set aside. As the jury gave general demages for the plaintiff, it cannot be said what amount the jury gave on each count; for they were given, the bad as well as the good. There must be a venire de novo.

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(*d*) AFTER TRIAL BY THE RECORD.

MUNKENBECK *v.* BUSHNELL, T. T. 1835. C. P. 4 *D. P. C.* 139; S. C. 1 *Scott*, 569.

After trial of the plea of nul tiel record, in an action on a recognisance to bail, and judgment on failure of record, amendment may be made.

DEBT on a recognisance of bail. The declaration stated the recognisance to have been entered into in an action of debt against J. L. On the production of the record on a plea of nul tiel record, it appeared that the original action was on promises.

The Court allowed the declaration to be amended on payment of costs; but required a special application for that purpose, and would not permit it to be made to prevent the defendant from obtaining judgment.

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(*e*) AFTER A SPECIAL CASE.

ROGERS *v.* HUMPHREYS, M. T. 1835. K. B. 4 *A. & E.* 299.

On a special case, the rule for judgment may be amended.

ON a special case raising the question to whom certain rent was to be paid, the Court ordered judgment to be entered up for the successful party for half a year's rent. On application of that party, it appearing on reference to the special case and postea that the rule for judgment should have been for a year's rent, and no judgment having yet been entered up, the Court, after cause shewn, amended the rule on payment of costs.

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4th.—AFTER FINAL JUDGMENT.

(*a*) OF AMENDING WRITS OF EXECUTION.

M'CORMACK *v.* MELTON, E. T. 1834. K. B. 3 *N. & M.* 881; S. C. 1 *Ad. & E.* 331—S. P. ARNELL *v.* WEATHERBY, H. T. 1835. Ex. 3 *D. P. C.* 464; S. C. 1 *C. M. & R.* 831.

The sum indorsed on a ca. sa.* may be

A CA. SA. was indorsed for 34*l.* 10*s.*; the sum recovered was 33*l.* 10*s.* After the defendant was taken into custody, *Taunton*, J.,

* And an error in the teste may be amended, even as against bail. (*Patteson*, J.—*Englehart* v. *Dunbar*, T. T. 1833, B. C., 2 D. P. C. 202; see 1 H. B. 74; 2 Chit. Rep. 251).

made to correspond with the judgment;

ordered the ca. sa. to be amended. On motion to discharge his order—

*Per Cur.*—Lord *Kenyon*, in *Laroche* v. *Wasbrough*, 2 T. R. 737, says—"The justice of the case requires that we should permit the plaintiff to amend: if the defendant had indeed suffered by the excess in the execution, that might have varied the case; but here he has not sustained any damage by it." It was so in the present case. The defendant is not damaged; and if he has suffered any inconvenience, it was his own fault in not paying what he owed.

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BRADLEY *v.* BAILLIE, M. T. 1834. C. P. 1 *Scott*, 78; 3 *D. P. C.* 111.

but not permitted where bail would be fixed, unless an opportunity be given to them of discharging themselves;

TOO large a sum had been stated in the ca. sa. On application for leave to amend, it was argued, that an action having been brought against the bail, the effect of the amendment would be to fix them. Leave granted, on terms of paying costs of action against bail, and giving them a week to render defendant.

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PHILLIPS *v.* TANNER, M. T. 1829. C. P. 6 *Bing.* 237; S. C. 3 *M. & P.* 562.

nor after the death of a defendant;

AFTER a writ of fi. fa. had issued, and after its execution, but before the sheriff had paid the money over, the defendant died. On motion to amend by inserting a testatum clause, the venue having been laid in London, and the defendant residing in Middlesex; and a fi. fa. having issued into London, and another into Middlesex, but not a testatum—

*Per Cur.*—It appears that the defendant died after the writ of fi. fa. was executed. We cannot know what steps the administrator may have since taken; he may have suffered judgment to be taken de bonis testatoris, for the benefit of some of the creditors of the deceased. The rights of the original parties were changed by the death of the defendant, against whom the writ was originally issued, and the rights of a third person intervened; and we are, therefore, of opinion, that the rule for the amendment of the writ ought to be discharged.

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HILDYARD *v.* BAKER, E. T. 1833. Ex. 1 *C. & M.* 611; 2 *D. P. C.* 16.

nor can the time for return of an elegit be altered on application of the sheriff;

A WRIT of elegit had been delivered to the sheriff on the 3rd April, returnable on the 15th. A seizure was made on the 6th; but the sheriff, understanding that the action was settled, allowed the time for the return to expire. The Court refused to allow the time of the return to be altered; at least, without the consent of the plaintiff.

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GREEN *v.* GLASSBROOK, T. T. 1835. C. P. 2 *Bing. N. S.* 143.

but a return to a fi. fa. of too large a sum may be amended.

THE plaintiff having paid his attorney all costs due, and required him to deliver up the judgment paper and fi. fa., the Court held that he had no authority to take any further steps; and having procured the return to be made for a greater sum than had come to the plaintiff's hands, the Court allowed it to be amended according to the fact.

(*b*) Of amending after error brought.

Richardson *v.* Mellish, M. T. 1825. C. P. 3 *Bing.* 334; S. C. 7 *B. & C.* 819; S. C. 11 *Moore,* 104; S. C. 2 *M. & Scott,* 191.

After a general verdict, postea may be amended by Judge's notes, so as to confine it to one count, the other being bad, even after error brought and argued;

A general verdict was found for the plaintiff on a declaration containing different counts. Several of them were bad; but all the evidence went to prove a valid count. After motion in arrest of judgment, the cause was removed by writ of error into the Court of King's Bench; and now, after argument on error, but before the Court of King's Bench had pronounced judgment—it having been suggested that a general verdict had been given, and that some of the counts in the declaration were bad, a motion was made for leave to amend the postea by entering the verdict on the first count only of the declaration, pursuant to the notes of Lord *Gifford,* who tried the cause.

*Per Cur.*—It is a rule of law, that, when a general verdict has been given on two counts, one of which is bad, and it appears by the Judge's notes that the jury calculated the damages on evidence applicable to the good count only, the Court will amend the verdict by entering it on that count, though evidence was given applicable to the bad count also. We have applied to the proper source—to the Judge who tried this cause. He has furnished us with his notes, and has expressed himself satisfied, not only that this amendment may be made, but that it ought to be made; and we are clearly of opinion that this rule ought to be made absolute.

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Hawkey *v.* Borwick, E. T. 1827. Ex. Chamb. 1 *Y. & J.* 376.

and when issues are entered informally, the hearing may be adjourned, to enable the party to apply to the Court below for leave to amend.

Error from the King's Bench. In this case there were two issues; and the jury had found for the plaintiff below on the first, but no verdict was entered upon the second. The Court of Exchequer proposed to adjourn the hearing of the case to afford an opportunity for the party to apply to the Court below to amend the record, unless the counsel would consent to argue, upon the presumption of such amendment.

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Doe *d.* Lawrie *v.* Dyball, H. T. 1828. C. P. 1 *M. & P.* 330.

In ejectment, amendment of record may be allowed by striking out the word "tenements."

This was an action of ejectment. In the declaration, the words "twenty tenements" were erroneously introduced. Plea, the general issue. After judgment, the defendant brought a writ of error. The plaintiff demurred to the assignment of errors. The defendant joined in demurrer; and, on the cause coming on for argument, the Court of King's Bench directed an application for leave to amend the record to be made to the Court of Common Pleas.

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Paddon *v.* Bartlett, M. T. 1835. Ex. Chamb. 5 *N. & M.* 383; S. C. 3 *A. & E.* 887, n.

A clerical mistake in a judgment may be corrected, even after the lapse

The declaration contained one count for 1600*l.* for twenty years' rent, at 80*l.* a-year; defendant pleaded to the whole action, actio non accrevit infra sex annos, and also as to 1420*l.*, parcel, &c.; that $17\frac{3}{4}$ years before plaintiff assigned over his reversion, and that

of a term, and a writ of error sued out.

no part of the 1420*l.* accrued before the assignment. Verdict for the plaintiff on the first issue, and for the defendant on the second.

The judgment was entered as follows:—Therefore, it is considered, that the plaintiff as to the last two counts in the said declaration take nothing by his said bill, but that he be in mercy, &c., for his false claim. And that the defendant do go thereof without day, &c. And it is further considered, that the defendant do recover against the plaintiff 83*l.*, for his costs and charges as to the said two last-mentioned counts, laid out by him about his defence in this behalf, adjudged to the defendant as to the said two last-mentioned counts by the Court of our said Lord the King now here by his own assent; and that the defendant have execution thereof," &c.

After one term had elapsed, on error assigning for cause, that, by the judgment, it appears that it was considered that the plaintiff, as to the last two counts in his said declaration, should take nothing by his said bill, and that he should be in mercy, &c.; whereas, the declaration contained one count only, and the action was commenced by writ and not by bill, as in and by the judgment is supposed was made. On motion to amend—

*Per Cur.*—The judgment may be amended, but the plaintiff ought to have the costs occasioned by the mistake.

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SIBONI *v.* KIRKMAN, M. T. 1837. Ex. 3 *M. & W.* 46; S. C. 6 *D. P. C.* 98.

Hence, the omission of the similiter may be corrected.

THE replication traversed the facts contained in the plea, and concluded to the country, without an &c.; after verdict, judgment, and writ of error brought, assigning for cause the want of the similiter; the Court said, they would assume it was a misprision of the clerks; the party having gone to trial without any objection.

*See* 6 *M. & S.* 50; 4 *Ad. & E.* 419.

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## V. OF AMENDING INCIDENTAL AND COLLATERAL PROCEEDINGS *.

REX *v.* JUSTICES OF LANCASHIRE, H. T. 1828. K B. 7 *B. & C.* 691.

A return to a writ of certiorari may be amended;

IN this case, the justices for the county of Lancaster had made a return to a certiorari, but by mistake the return was not signed.

On motion for leave to amend,

*Per Cur.*—We ought not only to allow, but to compel this amendment. The justices must not be allowed to defeat the process of the Court.

* A defect in a rule, attributable to an error of the clerks, may be amended without costs; (*Downing* v. *Jennings*, H. T., 1836, B. C., 5 D. P. C. 373); but the Court, in banc, has no jurisdiction to amend an order of Nisi Prius, until it has been made a rule of court. (*Cranch* v. *Tregoning*, M. T. 1836, B. C., 5 D. P. C. 230).

Where there has been a mistake of the clerks in entering up the judgment on sci. fa., to obtain execution on a judgment in debt, by entering it in the form of assumpsit, it is questionable whether the Court can amend it in a subsequent term. (*Kloss* v. *Dodd*, 1 Harr. & Wol. 342).

REG. *v.* BATCHELDOR, H. T. 1839. K. B. 1 *P. & D.* 516.

A RETURN to a habeas corpus stated, that, by an act of the Legislature of Upper Canada, upon the petition of any person charged with high treason, preferred before arraignment to the Lieutenant-Governor of the province, and praying to be pardoned, such governor was empowered to pardon him on such terms as might appear proper; and that in case any person should be pardoned on condition of transportation for life or for years, and should return to the province contrary to such condition, he should suffer death. The return then stated, that the prisoner was indicted for high treason, and, before arraignment, presented a petition confessing his guilt and praying for pardon; that he received a pardon on condition that he should be transported to Van Dieman's Land for fourteen years, to commence from his arrival there, to which condition he assented; that there being no direct means of transporting him from Upper Canada, it was necessary to take him to Quebec, in Lower Canada, whereto he was taken by the authority of the Lieutenant-Governor of Upper Canada, and by virtue of a warrant of the Lieutenant-Governor of Lower Canada was delivered to the custody of the Sheriff of Quebec until he could be transported; that there being no means of transporting the prisoner directly from Lower Canada to Van Dieman's Land, it was necessary to take him to England, and thereupon by letters patent, &c. &c.

or return of a writ of habeas corpus.

The name of the prisoner, with the names of several other prisoners, occurred in the recital of the letters patent set out in the return, but his name was accidentally omitted in the mandatory part of the letters. The return stated that his name occurred in the mandatory part also. The Court ordered the return to be amended, so as to agree with the letters patent, as it was improper that any false statement should appear on the records of the Court; but held, that the letters were not material to justify the prisoner's detention.

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Ex parte DAVIES, M. T. 1837. C. P. 4 *Bing.* N. S. 17; S. C. 5 *Scott*, 241; S. C. 6 *D. P. C.* 181.

THE writ of habeas corpus was tested the last day of Trinity Term of 1 Vict., instead of 7 W. 4. On application made on the part of the prisoner himself for leave to amend, the rule was granted.

*See* 1 *C. & J.* 467; 1 *Price*, 245.

So, teste of such writ,

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PRICE *v.* JAMES, M. T. 1833. B. C. 2 *D. P. C.* 435.

THE original action was in the names of Price *v.* Thomas James; in the order of reference the names of the defendant were put James Thomas. This transposition, it was contended, rendered the order of reference a nullity; but *Littledale*, J., after consulting with the Judges, discharged a rule to set aside the order of reference, and granted leave to amend the order.

*See* 2 *Chit. Rep.* 174; 4 *Bing.* 278; 6 *M. & S.* 50; 5 *B. Moore*, 167.

and a transposition of the names of parties in an order of reference, is amendable.

## VI. OF AMENDING INFORMATIONS.

THE ATTORNEY-GENERAL *v.* SMITH, T. T. 1839. Ex. 5 *M. & W.* 372.

At the instance of the Crown an information may be amended by adding counts after plea.

THIS was an information with respect to British spirits, for concealment, with intent to defraud her Majesty of the duty. The defendants claimed the property, gave bail, and pleaded; when the Attorney-General obtained a side-bar rule to add two counts to the information. On application to rescind the order for the amendment, on the ground, that, in a case where bail had been given, the Crown was not entitled to amend, as it might prejudice the bail, and would be a great hardship on the defendants, who were brought into Court on a charge of fraud, and pleaded to that charge, to have afterwards a new charge set up against them—

*Sed per Cur.*—The Crown may amend. The recognisance is, to pay the costs occasioned by the claim; and that is entered into before the information is filed; the amendment makes no difference, because the bail must take the chance of what the Crown may do.

## VII. OF THE COSTS ON*. See also ante, p. 171, *Amendment after Demurrer.*

WALL *v.* LYON, M. T. 1832. C. P. 1 *D. P. C.* 714; S. C. *by the name of* LYON *v.* WALLS, 2 *M. & Scott*, 579.

Notwithstanding the language of the R. M. 1654, it is discretionary whether costs shall be paid on amending after plea;

A JUDGE had made an order to amend after plea in abatement, without payment of costs. On motion to vary the language of the order, making it on payment of costs, the R. M. 1654, being "upon costs and liberty to plead, with a new plea or further imparlance," the Court refused the application, as the language of the rule of Court did not take away the Judge's discretion as to costs.

GOULD *v.* OLIVER, M. T. 1838. C. P. 5 *Bing. N. S.* 115.

and when given, are only those occasioned by the amendment.

THE plaintiff amended his declaration after plea, on payment of costs. The defendant then paid money into Court, which neutralized one of his pleas. On the taxation he contended he was entitled to the costs of such plea.

*Sed per Cur.*—It is clear that the allowance of an amendment upon payment of costs must mean costs substantially occasioned by the amendment.

COLLINS *v.* AARON, H. T. 1838. C. P. 5 *Scott*, 595; S. C. 6 *D. P. C.* 423.

The Judge may fix the amount of costs.

THE plaintiff obtained an order to amend his declaration. The defendant stated, to amend his plea would cost 5*l.* But *Park*, J., made an order, that the costs of the amendment should be only 3*s.* 4*d.*,

* Where an amendment is ordered on payment of costs, and the party amending goes on and does not pay the costs, still no attachment lies. (*Turner* v. *Gill*, M. T. 1834, K. B., 3 D. P. C. 30).

instead of 5*l.*, which the defendant claimed. On motion to rescind that order—

*Per Cur.*—With regard to the taxation, it is said, that, by taking it upon himself, the Judge has gone out of his province, and has done that which should be done by the Master. There certainly is no necessity for Judges who attend Chambers to take any additional trouble upon themselves; but it was undoubtedly competent to the Judge to tax the costs, instead of sending the matter to the Master, who is but the ministerial officer of the Court. The Judge, we repeat, is competent to perform the duty, mindful of and acting upon the precept, est boni judicis ampliare jurisdictionem, which latter word has, it should be recollected, been always looked upon as synonymous with justitiam. The defendant here estimated his costs at 5*l.*; such estimate appeared to the Judge preposterous, and the attempt was not allowed.

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PRAED *v.* HAMMOND, M. T. 1827. Ex. 2 *Y. & J.* 32.

Where, on appointments to amend, the defendant does not attend, the Master should allow the costs of the plaintiff's attendance.

ON motion to compel the Master to allow certain attendances to the plaintiff's attorney, it appeared that three appointments were made by the Master upon an order for the plaintiff to amend, upon payment of costs; and the attorney for the plaintiff attended the Master accordingly, but no one appeared for the defendant.

The Court held, that the Master should indorse the order, allowing the sum of 3*s.* 4*d.* for the costs of the attendance, without requiring an affidavit of the service of the appointments or of the attendances.

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POPKINS *v.* AMORY, E. T. 1831. C. P. 5 *M. & P.* 319.

But no costs will be given where the irregularity is amendable, as a matter of course;

ON a rule calling upon the plaintiff to shew cause why the attachment of privilege and bail-bond in this cause should not be set aside for irregularity, there not being fifteen days between the teste and the return day.

It was contended, that it was a defect which had been frequently amended as of course, by the Court. *Davis* v. *Owen*, 1 B. & P. 342, was cited, and the Court discharged the rule, and allowed the plaintiff to amend without costs, intimating, that wherever proceedings are amendable as of course, applications to set them aside for informalities will be fruitless.

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SANDERSON *v.* PIPER, E. T. 1839. C. P. 7 *Scott*, 418.

or, at all events, only nominal costs.

IN an action on a bill of exchange for 245*l.*, a question of variance arose, and the point was reserved for argument. The defendants claimed the costs of the argument, on the ground that the declaration was not so framed as to entitle the plaintiffs to recover, as upon a bill for 200*l.*, and that this was not a case for amendment under the 3 & 4 Will. 4, c. 42, s. 23; but the Court refused to allow them, and held, that it was a case for amendment at the trial upon nominal costs.

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POCOCK *v.* SHELL, H. T. 1839. C. P. 7 *Scott*, 229.

Where a declaration aws ed-

THE declaration being demurred to for a substantial defect, the plaintiff obtained an order to amend, on payment of costs. On

murred to, and the plaintiff had leave to amend, but, the demurrer being a nullity, signed judgment, the Court set aside the judgment on payment of costs, and allowed the amendment on the same terms.

attending the taxation, it was discovered that the demurrer was not signed by counsel, whereupon the plaintiff signed judgment for want of a plea.

*Bosanquet*, J., stayed the proceedings, in order that the opinion of the Court might be taken, by moving to set aside the judgment. On motion for that purpose—

*Per Cur.*—We think, under the circumstances, that the justice of the case will be met by making this rule absolute on payment of costs; the plaintiff to be at liberty to amend his declaration also on payment of costs of the amendment.

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**Ancestors.** See tits. *Devise—Heir.*

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**Ancient Demesne*.**

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**Ancient Lights.** See tits. *Easement—Lights.*

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## Animals†.

See tits. *Action, Notice of—Cattle.*

* All those estates, designated in Doomsday Book terræ regis, were manors belonging to the Crown, being part of its ancient demesne. A great portion of the lands comprised within them was in the hands of tenants who held the same of the Crown by a peculiar species of socage tenure, which has long been known by the appellation of "ancient demesne," (4 Inst. 58). Whether ancient demesne or not, can only be determined by a reference to Doomsday Book. (Dyer, 250; 2 Burr. 1046. See 2 Scriven on Cop. 650—685; Com. Dig. *Ancient Demesne;* and 3rd Real Property Report, 12, 13). The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the Lord's court. Hence, the titles to lands of that tenure were frequently involved in considerable difficulties, in consequence of fines and recoveries having by mistake been levied or suffered in the Court of Common Pleas, instead of being levied or suffered in the Court of the manor; but lands of this tenure were so far within the jurisdiction of the Court of Common Pleas, that a fine or recovery was in force between the parties, and was voidable only by the lord, by writ of deceit. But now by the statute 3 & 4 Will. 4, c. 74, s. 4, reciting, "That fines and recoveries of lands in ancient demesne, when levied or suffered in a superior Court, might be reversed, as to the lord, by writs of deceit, the proceedings in which were then pending, or by writs of deceit thereafter to be brought, but should be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord; it is enacted that (by sect. 5,) fines and recoveries of land in ancient demesne, levied or suffered in the manor Court, after other fines and recoveries in a superior Court, shall be as valid as if the tenure had not been changed, and fines and recoveries shall not be invalid in other cases, though levied or suffered in Courts whose jurisdictions may not extend to the lands therein comprised;" and it is further provided, (sect. 6,) "that the tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior Court, shall be restored, in cases in which the right of the lord of the manor shall have been recognised within twenty years. It is further to be observed, that the writ of deceit is abolished by the 3 & 4 Will. 4, c. 27, s. 36.

† Animals are distinguished into such as are domita and such as are ferræ naturæ. In the former a party may have absolute property, as in any inanimate thing, and the stealing or forcible abduction of such property is felony; but in the latter a person can have no absolute property. It is, however, larceny at common law to steal an ass, a mule, swine, goats, or any kind of poultry, whether

THOMAS *v.* MORGAN, T. T. 1835. EX. 2 *C., M., & R.,* 496; S. C. 4 *D. P. C.* 223; S. P. HOGAN *v.* SHARPE, N. P. 7 *C. & P,* 755.

Under the plea of not guilty in an action for keeping mischievous animals, the scienter must be proved.

ACTION on the case for keeping dogs, which defendant well knew to be of a mischievous disposition. Plea not guilty. It was contended that the scienter was a material allegation, which was not put in issue by the plea of not guilty, and that that plea merely put in issue the wrongful act of which the plaintiff complained—that his cattle were bit and injured by the defendant's dogs. The case of *Frankum* v. *Earl of Falmouth,* 4 N. & M. 330, was cited.

*Sed per* Lord *Abinger,* C. B.—The wrongful act charged against the defendant is, that he kept the dogs with a knowledge of their disposition, and that the plaintiff sustained an injury in consequence. Not guilty, therefore puts the scienter in issue.

It was proved in this case that offers had been made by the de-

fowls, ducks, geese, turkeys, peacocks, guinea fowls, and their chickens and eggs, and young pigeons, in the house, and unable to fly; and all dead eatable animals; and fish, whether in a tank or not, or pheasants or other game in a mew, and a swarm of bees whilst in the hive, or upon the tree or land of a particular individual, and not quickly pursued by the party from whose hive they had proceeded. It is indeed a general rule, with respect to such descriptions of personal property, that a civil action might be supported for taking the same out of, or injuring the same whilst in, the actual possession of the qualified owner. But with regard to wild animals, or fish, when alive in a state of nature or at large, either on land or in water, and not recently escaped from the usual place of confinement, there is not at common law any such property as would enable any supposed owner to indict a party for larceny in taking the same; and an indictment for stealing a pheasant, value 40*s.*, of the goods and chattels of R. S., was held insufficient; for, in cases of larceny of animals, feræ naturæ, the indictment, must shew that they were either dead, tamed, or confined, for otherwise it will be presumed that they were alive and in their original wild state of nature; and that it is not sufficient to add, of the goods and chattels of such a one, (2 East, P. C. 607); though an action of trespass might be supported for taking game when dead, or when upon the land, or out of the actual possession of a particular person, when he is considered the qualified owner;" and modern acts expressly provide pecuniary penalties for taking game or fish under such circumstances, (7 & 8. Geo. 4, c. 29; 1 Will. 4, c. 32). Trespass in general lies for taking any animal or bird whatsoever out of the actual possession of a person who has secured the same; but no action lies for enticing from the premises of the owner and afterwards killing or injuring a cat, which is not considered of any value in law, or any naturally wild animal. And no indictment could be supported at common law for stealing a dog, cat, bear, fox, monkey, or ferret, although taken out of the possession of the owner; (2 East, P. C. 614); though, whilst in the actual possession, even a ferret, and other animals, however inferior, would pass as part of the personal estate to the executors.

As this absence of criminal punishment, in many cases of animals, (the possession of which, for purposes of sport or pleasure, become in a degree valuable to mankind), was found to encourage small injuries in the nature of larceny, it has been recently provided, "that to steal any dog, or any beast or bird, ordinarily kept in a state of confinement, and not constituting the offence of larceny at common law, may be punished by summary proceeding before a magistrate, with a conviction in 20*l.* penalty, and the punishment is to be increased on repetition of such offence, (7 & 8 Geo. 4, c. 29). And the killing or taking away of pigeons, or house-doves, when at large, and under circumstances not amounting to a felonious taking at common law, subjects the offender to the penalty of 2*l.*; and the taking of fish is, by the same act, especially prohibited under certain penalties. The taking of deer, and hares, and conies in warrens or places used for breeding or keeping the same, is also prohibited and punishable under the same act. (1 & 2 Will. 4, c. 32).

The owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to the person or personal property, unless it can be shewn that he previously had

fendant to settle, if it could be proved that the injury had been occasioned by his dogs. The Court held that to be slight evidence of the scienter, but that mere proof that the dogs had bit the cattle of other persons, and were of a savage nature, was no evidence that the defendant knew them to be accustomed to bite.

## Annexations to Land. See tit. *Easements—Fixtures.*

notice of the animal's mischievous propensity, or that the injury was attributable to some other neglect on his part; it being, in general, necessary, in an action for an injury committed by such animals, to allege and prove the scienter; and though notice can be proved, yet the action must be case, and not trespass. (12 Mod., 333; Salk. 662; Ld. Raym. 508). But if the owner himself acted illegally, he may be liable even as a trespasser, as where a person, in company with his dog, trespassed in a close through which there was no footpath, and the dog, without his concurrence, killed the plaintiff's deer; (Burr. 2091; 2 Lev.172; 1 C. & P. 119); and if a person let loose, and permit a dangerous animal to go at large, and mischief ensue, he is liable as a trespasser, the law in such cases presuming notice to the defendant of the mischievous propensity of such animal. (3 East, 594; 12 Mod. 333; Ld. Raym. 1583). With respect to animals mansuetæ naturæ, as cows and sheep, as their propensity to rove is notorious, the owner is bound, at all events, to confine them on his own land; and if they escape, and commit a trespass on the land of another, unless through the defect of fences, which the latter ought to repair, the owner is liable to an action of trespass, though he had no notice, in fact, of such propensity. But for damage by animals, &c. feræ naturæ, escaping from the land of one person to that of another, as by rabbits, pigeons, &c., no action can, in general, be supported; because the instant they escaped from the land of the owner his property in them was determined. (5 Co. 104 b; Cro. Car. 887).

No action is maintainable against the owner of a dog, or other domesticated animal, which, against his master's will, commits a trespass; (*Brown* v. *Giles*, 1824, N. P., 1 C. & P. 119); but the fact of the defendant not being the real owner of the dog that has committed an injury will not vary his liability, if he were really guilty of negligence. (*M'Kone* v. *Wood*, T. T. 1831, N. P., 5 C. & P. 1). The owner of a dog placed in a private way to a house is liable for any damage done, if the plaintiff had a justifiable cause for passing through the way, although notice be affixed. (*Sarch* v. *Blackburn*, H. T. 1830, N. P., 4 C. & P. 297; 1 M. & M. 505; see 1 M. & P. 607; 1 Esp. 203). A plea, that a dog is accustomed to bite mankind, and that he attacked the defendant, must be supported by proof of the former allegation as well as the latter. (*Clarke* v. *Webster*, 1824, C. P., N. P., 1 C. & P. 104).

Plea in trespass for shooting a dog, that he was ferocious, and had attacked the plaintiff:—Held not supported, when it appeared that the animal, after having attacked the defendant, was running away; the circumstance of the animal being of a ferocious disposition will not justify the shooting, unless actually attacking the party at the time. (*Morris* v. *Nugent*, N. P. 1836, 7 C. & P. 572).

By 5 & 6 Will. 4. c. 59, s. 2, if any person "shall wantonly and cruelly treat, ill-treat, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, dog, or any other cattle or domestic animal, or if any person who shall drive any cattle or other animal, shall, by negligence or ill-usage in the driving thereof, be the means whereby any mischief, damage, or injury shall be done by any such cattle or other animal," upon conviction before one justice, he shall forfeit and pay (over and above the amount of the damage or injury, if any done thereby, which damage or injury shall be ascertained and determined by such justice), such a sum of money, not exceeding 40*s.*, nor less than 5*s.*, with costs, as to such justice shall seem meet, or, in default of payment, he shall be imprisoned for not more than fourteen days.

# Annuity*.

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* An annuity is the grant of a certain sum of money to be paid by the grantor or his representative, at the expiration of fixed consecutive periods, for a definite term, or for life, or in fee. Formerly, the term annuity referred to the nature of the security on which the grantee relied, and expressed a charge upon the person or personal estate of the grantor only, while a charge upon the real estate of the grantor was signified by the term of a rent. At the present day an annuity is applied indiscriminately to every species of security, but a rent charge still retains its ancient limited signification. When the rent was granted to issue out of certain land, and a power of distress on the land charged was also given to the grantee, it was termed a rent-charge; but when that power was not given, it was termed a rent-seck. The proper remedy for this latter was an assise, (abolished by 3 & 4 Will. 4, c. 27, s. 36); but as this was too tedious a remedy, and had, therefore, almost become obsolete, the statute 4 Geo. 2, c. 28, s. 5, enacted, that for all rents-seck which had been paid for three years within the twenty years prior to that act (1731), or should be created thereafter, there should be the like remedies by distress as were then allowed by law for rents reserved on leases. (See Mr. Lumley's valuable Treatise on Annuities, and 1 Peters. Abr. 623).

## I. CONTENTS* AND CONSTRUCTION OF GRANTS OF, AND OF DEVISES OF.

LEWIS *v.* HOOPER, M. T. 1834. K. B. 2 *Ad. & E.* 135; S. C. 4 *N. & M.* 318.

It is indispensable that the consideration should be set out with truth, and in what form paid, otherwise the deed is void.

THE memorial of an annuity-deed stated the consideration to be Notes of the Governor and Company of the Bank of England; and it appeared, by affidavit, that it was paid by drafts on bankers and country bank notes; and the Court said, the 2nd section of 53 Geo. 3, c. 141, requires, that the pecuniary consideration or considerations for granting annuities, &c. should be inrolled, and then the act gives a form in which is to be stated the consideration, and how paid. In a variety of cases it has been held, that the consideration must be set out according to the truth, otherwise the deed is null and void; and it is not a matter for the discretion of the Court.

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SAFFERY *v.* ELGOOD, E. T. 1834. K. B. 3 *N. & M.* 346; S. C. 1 *Ad. & E.* 191.

Where the grant of an annuity is charged on land, it will enure for the term the grantor is entitled to it;

IN replevin. The defendants made cognizance of taking the goods by a distress for arrears of a rent-charge granted by a tenant for years; the annuity being for three lives.

On demurrer, it was contended that the grant of the rent-charge for lives by a tenant for years was void; this being granted by a termor for lives, and not for years determinable upon lives, is the grant of a greater estate than the termor had.

*Sed per Cur.*—The grant is good for the term for which the termor could grant.

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BARFORD *v.* STUCKEY, T. T. 1824. K. B. 3 *B. & C.* 308; S. C. 5 *D. & R.* 118.

but an annuity to A., his executors and administrators, or children, or wife, for twenty-one years, is determined by the death of A., his children, and wife, and does not go to his representatives.

ON a writ of error, it appeared that B. J. and W. S., by deed reciting that J. S. had left them estates in strict settlement, with remainder over, on failure of issue male, to N. P., out of regard to N. P; and considering that J. S. had made no other provision for him, agreed with N. P., his executors and administrators, to pay him an annuity for twenty-one years, if B. J. and W. S., or the survivor of them, should so long live; and in case of N. P.'s death within the term, to his child or children, if any, in such proportions as he should appoint; or, in default of appointment, to all of them equally; and if there should be no child, to his wife, so long as she should be a widow. N. P. covenanted, that, in case he or his heirs should come into possession of the said estates, he, his heirs, executors, or administrators, should repay all sums received by him, his children, or wife, on account of the annuity. N. P., his wife, and child, died within the term, and the Court of Common Pleas decided that the deed did not operate as a grant of an annuity for twenty-one years absolutely, but that it was intended as a provision for N. P. and his family only, and was determinable on the death of N. P., his wife, and child. Therefore, N. P.'s admi-

* A grant, originally valid, cannot be impeached by subsequent arrangements of an illegal nature, unless the latter can be connected with the original contract. (*Friend* v. *Harrison*, H. T. 1827, N. P., 2 C. & P. 584; see Amb. 641; 2 Atk. 85, 333; 2 Ves. 166; 1 Mod. 558; 6 B. & C. 133).

nistrator had no right to the annuity for the residue of the term; which judgment was confirmed by the Court of King's Bench on a writ of error.

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MORRANT *v.* GOUGH, T. T. 1827. K. B. 7 *B. & C.* 206; S. C. 1 *M. & R.* 41.

IN an action against a devisee in trust, for the arrears of an annuity secured by a bond of the testator, without a penalty binding his heirs, executors and administrators, to be paid after the testator's decease, the defendant pleaded a devise to him in trust for testator's son, T. S., for the purpose of maintaining such son until he should attain the age of twenty-one years, and that he should account with such son, on his attaining that age, for the profits of the estate; and that T. S., long before the exhibiting of the bill of the plaintiff, had died: whereupon his, the said defendant's, interest in the testator's estate ceased; and that all money which became due upon the account during the life of T. S. was paid. On demurrer—

So, where the grantor of an annuity to A. B. of 20*l.* a year for life, devised his estates to trustees until his son should attain the age of twenty-one:—Held, that the annuity ceased upon the son's death, who died under twenty-one.

*Per Cur.*—In this case it appears, that, had the son attained the age of twenty-one, nothing would have remained to be done by the trustees; neither is there anything to be done by them in case of his decease before that age, subsequently to that event. Now, it is clear the annuity ceased on his death.

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STOW *v.* DAVENPORT, T. T. 1833. K. B. 2 *N. & M.* 805; S. C. 5 *B. & Ad.* 359.

LANDS were devised to the use, among others, that M. A. F. should take from and out of the same premises an annuity or yearly rent-charge of 500*l.* a-year, to be paid clear of all taxes and deductions, remainder to S. for life, subject to the annuity. The Court held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; consequently that S., who had entered into possession under the devise to him, and had been compelled to pay the legacy duty on the annuity pursuant to 45 Geo. 3, c. 28, s. 5, could not recover it again from the annuitant.

Devise to A. to take out of certain lands an annuity, clear of all taxes and deductions, is payable clear of legacy duty.

*See post, tit.* "*Legacy.*"

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SAWARD *v.* ANSTEY, *in error*, H. T. 1825. C. P. 2 *Bing.* 519. S. C. 10 *Moore*, 55.

ACTION of covenant. The plaintiff had, by indenture, contracted to sell and convey to the defendant certain estates left him under the will of his father, chargeable with the payment of four several annuities to his sisters. The defendant covenanted to pay such annuities as the same were by the will directed to be paid, and that he would at all times thereafter save and indemnify the plaintiff from and against all actions, suits, and demands on account of the same annuities, or in anywise relating thereto. The Court of Common Pleas held, that the defendant was liable to the payment of such annuities, although it was objected that the covenant for the payment of them and indemnifying the plaintiff was one entire covenant, and to be construed as a covenant to indemnify, by paying such annuities only as the plaintiff himself would have been bound to have done or had actually paid, and that he was not personally liable to pay them. The Court of King's Bench affirmed that judgment.

A devisee of an estate charged with annuities, on selling the property, took covenants from the purchaser to pay the annuity and indemnify him. A declaration alleged, as a breach, the non-payment of the annuities, without alleging that the plaintiff had been damnified:—Held, sufficient.

## II. BY WHOM GRANTED, AND ON WHAT PROPERTY CHARGEABLE.

CLARKE *v.* THE IMPERIAL GAS LIGHT COMPANY, M. T. 1832. K. B. 4 *B. & Ad.* 315; S. C. 1 *N. & M.* 206.

The directors of an incorporated company, authorized to transact the ordinary proceedings of the company, may grant an annuity for life to a retired clerk, as a pension for services performed.

BY 1 & 2 Geo. 4, the defendants were incorporated with all the rights and privileges of a corporation. By the 52nd section, certain persons are appointed directors to transact the business of the company; and, by the 71st section, their power is confined to the ordinary proceedings of the company. The company, however, granted an annuity for life to a retired clerk, by way of pension; the deed by which such annuity was granted had the corporation seal affixed. In an action for the annuity, the company contended that the deed was invalid.

*Sed per Cur.*—It is objected that this deed is such a contract as cannot be made under the provisions of the act. Now, if the provisions of the act had not been complied with, it would be incumbent upon us to give effect to the objection; but the company, in setting aside an agreement of their own, should clearly make out that proposition. It does not appear but that all the forms required by the act may have been complied with; and, inasmuch as the seal was set to this deed by the proper officers, and the subject-matter of the deed within the scope of their power, we cannot interfere.

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GILLOW *v.* LILLIE, E. T. 1835. C. P. 1 *Scott*, 597; S. C. 1 *Bing. N. S.* 695.

But an infant cannot; though, if there be one of several grantors, it is good against the adult, if joint and several.

A. AND B. were grantors of a joint and several annuity. To an action on the annuity-deed, the defendants pleaded, that B., in the indenture named, at the time of the making of the indenture, was an infant, within the age of twenty-one years, to wit, of the age of twenty years; whereby, and according to the statute in such case made and provided, the said indenture was and is void in law. On demurrer,

*Per Cur.*—If this was merely the joint grant of an annuity made by the defendant and an infant, it may be said, that the contract being void as to part, should be so altogether; but when we look at the form of the deed, we find it to be the separate grant by each of an annuity: each covenants severally to pay; and there is no reason that the covenant should be void against one of full age, because it is void against one who is not of full age.

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FLIGHT *v.* SALTER, H. T. 1831. K. B. 1 *B. & Ad.* 673.

A judgment cannot be given so as to be a *continuing* charge upon a living, as a security for the annuity*,

THE warrant of attorney recited the grant of an annuity, which was secured on the defendant's rectory, and a covenant that the plaintiff might, immediately on the execution of the deed, procure a sequestration of the living, and continue it during the continuance of the annuity, for the purpose of more effectually securing the same. It then authorized the judgment to be entered up, to secure the annuity at the time and in the manner aforesaid, and to the end

* Other parties, as well as the clergyman—for instance, creditors—may apply to set aside the sequestration. (*Newland* v. *Watkin*, 9 Bing. 113; S. C. 9 B. & C. 344; S. C. 4 M. & R. 249). See post. 227.

and intent that a sequestration might be obtained or procured and continued by the grantee, pursuant to the covenant. The Court held, that it was bad, being apparent on the face of the instrument that it was a continuing charge created on the living; and *Littledale*, J., said—A judgment given bonâ fide, without any intention to evade the statute*, might, on failure of other property, have been available against the living; but this warrant of attorney having been given to the intent that a sequestration might issue, would, if it were held good, have the effect of contravening the statute. It must be set aside.

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KIRLEW *v.* BUTTS, E. T. 1831. K. B. 2 *B. & Ad.* 736—S. P. DOE *d.* MOORE *v.* RAMSDEN, H. T. 1837. K. B. 1 *N. & M.* 489.

although it may not appear expressly on the face of the instrument.

THE warrant of attorney authorized judgment to be entered for a certain sum; and if default were made in payment of the annuity for fourteen days, execution was to be taken out against the defendant's estate for the whole sum; and, accordingly, his living had been sequestered for that whole amount, whereby the living became charged with the annuity. The Court set aside the sequestration beyond the amount of the arrears due when it issued; and said it need not appear on the face of the instrument that it was to be a continuing charge, to render it void.

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COLEBROOKE *v.* LAYTON, H. T. 1833. K. B. 1 *N. & M.* 374—S. P. GIBBONS *v.* COOPER, T. T. 1831. K. B. 2 *B. & Ad.* 734—NEWLAND *v.* WATKINS, T. T. 1832. C. P. 9 *Bing.* 113, *semble contra.*

But it has since been held, that a warrant of attorney in the common form, containing nothing to shew that the continuing charge was intended to be created, is, as regards the arrears, valid.

AN annuity was granted by deed, chargeable on an ecclesiastical benefice; a bond and warrant of attorney were given as collateral securities. The bond recited that the annuity was charged on a vicarage, and the defeasance on the warrant of attorney (which was in the common form) referred to the bond. The Court held, that the warrant of attorney was not void by the statute 13 Eliz. c. 20, as the reference to the bond was merely by way of indemnity; and the Court referred to the case *Kirlew v. Butts* (supra). There, the Court said, "We proceeded entirely on the ground that we could not set aside the warrant of attorney when the defeasance did not express that it was to operate as a continuing charge upon the living. We should set aside any execution which operated in that way."

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DOE *d.* BROUGHTON *v.* GULLY, H. T. 1829. K. B. 9 *B. & C.* 344; S. C. 4 *M. & R.* 249—DOE *d.* CATES, *v.* SOMERVILLE, M. T. 1826. K. B. 6 *B & C.* 126; S. C. 9 *D. & R.* 100—S. P. DOE *d.* WILKS *v.* RAMSDEN, E. T. 1833. K. B. 4 *B. & Ad.* 608.

But annuities charged on be-

IN August, 1811, and after the passing of the 43 Geo. 3, c. 154, an annuity was granted and charged upon a benefice, but was de-

* The statute does not create any incapacity in the clergyman to grant, it only forbids his charging his benefice with it. Hence, he may charge his personal, or any other property which he may possess; and, indeed, through his personal obligation, he may charge his living. For, if a judgment be recovered against him, either on his covenant or bond, or on a warrant of attorney, the usual writs of execution may be taken out against him, and among these is the process of sequestration, which issues against his living. (*Mouys* v. *Leake*, 8 T. R. 411; *Faircloth* v. *Gurney*, 9 Bing. 622; S. C. 2 M. & S. 822. Post, 217).

nefices between the 7th July, 1803, (43 Geo. 3, c. 84)* and 10th July, 1817, (57 Geo. 3, c. 99), are sustainable.

mised to the grantee by way of security. After the 57 Geo. 3, c. 99, the grantor borrowed a sum of money and redeemed the annuity, but directed the original demise, so created by him, to be assigned to the party advancing that money, and also other sums, as a security for the whole. It was held, that this assignment was but a continuance of the original charge, the only change being the reduction of the annuity to common interest; and, therefore, as that was created before the 57 Geo. 3, c. 99, it was a valid security.

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SHAW *v.* PRITCHARD, M. T. 1829. K. B. 10 *B. & C.* 241; S. C. 5 *M. & R.* 180—BOWYER *v.* PRITCHARD, M. T. 1822. Ex. 11 *Price*, 103.

The stat. 57 Geo. 3, c. 99, revives the 13 Eliz. c. 20; and, therefore, a demise of glebe by an incumbent, to secure an annuity, is void.

BY indenture, 8th September, 1826, the defendant, who was incumbent of a benefice, demised the glebe to the grantee at a nominal rent, to secure the payment of a certain annuity. It was contended, that, at common law, the lease would have been undoubtedly good; and, while the statute of 13 Eliz. c. 20, was in full operation, and before the enabling statute of 33 Geo. 3, c. 84, demises in this form were common. In *Doe* d. *Cates* v. *Somerville*, 6 B. & C. 126, and in *Doe* d. *Broughton* v. *Gully*, ante, p. 209, the leases being granted after the repealing statute of 43 Geo. 3, c. 84, and before 57 Geo. 3, c. 99, were clearly good; and though, in that case, the circumstance of the demise having been made before 57 Geo. 3, c. 99, was mentioned by the Court, it was not necessary to consider whether the repeal of 13 Eliz. c. 20, would have been less complete under 57 Geo. 3, c. 99, than it was under 43 Geo. 3, c. 84. The reference by the learned Judges, therefore, to 57 Geo. 3, c. 99, amounted to no more than this—that the lease then before the Court having been granted during the continuance of 43 Geo. 3, c. 84, which undoubtedly repealed the statute of Eliz., would be valid, even assuming that the prohibitory clauses of the statute of Eliz. were restored by 57 Geo. 3, c. 99. But the Court decided that the lease was, in substance, a charge, and fell under the prohibition of the statute.

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SALTMARSHE *v.* HEWETT, T. T. 1834. K. B. 3 *N. & M.* 656; S. C. 1 *Ad. & E.* 812—S. P. NEWLAND *v.* WATKIN, T. T. 1832. C. P. 9 *Bing.* 113.

So, is a warrant of attorney, expressly given as a security upon a benefice, under 13 Eliz.

BY the defeasance of the warrant of attorney it was provided, that, in case of any arrear of the annuity, it should be lawful to sue out such executions as the party thought fit, and also to sequester the said rectory.

*Per Cur.*—From the language of the defeasance, we are of opinion, that enough appears to shew that the warrant of attorney was

* By this act the statutes 14 Eliz. c. 11, 39 Eliz. c. 18, 43 Eliz. c. 9, are wholly repealed; whereby the power which the beneficed clergyman had at common law of charging his benefice revived. By the 57 Geo. 3, c. 99, s. 1, this statute was totally repealed, and so much of the previous statutes as relate to leases of benefices and livings, and the residence of spiritual persons on their benefices was also repealed. But this was not a total repeal of those statutes; and so much as related to the chargings of benefices was therefore revived.

given to charge the benefice, and that it is therefore void by the statute 13 Eliz. It seems proper to add, that the authorities upon the subject, with the exception of *Colebrook* v. *Layton*, 4 B. & Ad. 578, which is of a more recent date, namely, *Shaw* v. *Pritchard*, ante, p. 210, *Flight* v. *Salter*, *Gibbons* v. *Hooper*, and *Doe* v. *Carter*, were brought under the consideration of the Court of Common Pleas in *Newland* v. *Watkin*, ante, p. 210. There a rule had been obtained to set aside the plaintiff's warrant of attorney, judgment, and sequestration. The warrant of attorney is not set out, but the report states that it was given to enter up judgment for the arrears of the annuity, and expressly authorized him to issue sequestration. The Court, having taken time to consider, made the rule absolute.

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MOORE *v.* RAMSDEN, H. T. 1838. K. B. 3 *N. & P.* 180; S. C. 7 *A. & E.* 898.

but a warrant attorney not in terms charging the benefice is valid, although collaterally it may have that effect.

IN 1813, the defendant charged his benefice, a rectory, for the payment of an annuity by a demise, for a term, which, in 1825, with other similar charges, were transferred to the plaintiff; and by the same deed he also demised the rectory and a vicarage for a term, with power to sequester, and a warrant of attorney was executed as a collateral security, but no power to sequester was therein given, either expressly or by reference to the deed of demise. The plaintiff afterwards brought ejectment and obtained possession of the rectory, and subsequently entered up judgment on the warrant of attorney, and sequestered the vicarage.

The Court held, that the warrant of attorney, not in terms charging the benefice, was not void, and that the plaintiff was entitled to apply the sequestration to satisfy the accruing annuities, and keep alive the sequestration until the old arrears were paid.

*See* 3 *B. & Ad.* 915.

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JOHNSON *v.* BRASIER, T. T. 1834. K. B. 3 *N. & M.* 654—S. P. BRITTEN *v.* WAIT, T. T. 1832. K. B. 3 *B. & Ad.* 915.

At all events, upon a sequestration upon a levari facias, the Court will not look at the indenture to decide whether it has that effect.

UPON a rule under the interpleader act, it appeared that the defeasance of a warrant of attorney to confess judgment, executed by A., a beneficed clergyman, stated that it was given to secure to B. the payment of an annuity granted by A. to B. for his life, described in a certain indenture, of even date, between the said A. and B.; that in the indenture it was agreed that judgment should be entered up on the warrant of attorney, but that no execution should issue until the annuity should have been in arrear fourteen days after any of the days for payment expressed in the indenture; but that, if the annuity should be so in arrear, B. might sue out execution upon, or by virtue of the judgment, as he should think fit, for the recovery of the arrears, and all costs. Upon a question as to the validity of a sequestration granted by the Bishop, in pursuance of a writ of levari facias issued upon the judgment entered up on the warrant of attorney—

The Court refused to look at the indenture with the view of deciding whether it created a charge on A.'s benefice or not.

## III. OF THE MEMORIAL*.

### (*a*) When requisite.

CUMBERLAND *v.* KELLEY, E. T. 1832. K. B. 3 *B. & Ad.* 602.

When the consideration is stock in the funds, not money, an enrolment is not required.

STOCK in the funds had been transferred to the grantor, in consideration of the grant of the annuity. No registration had been made. It was argued that stock was not money, nor a pecuniary consideration; while it was answered, that, with the facility which exists for converting it into money at any time, it must be treated as a pecuniary consideration.

The Court, after a second argument, decided that the transfer of stock was not a pecuniary consideration.

*S. P. Moren* v. *Douthwaite*, 1 *Madd.* 446.

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TETLEY *v.* TETLEY, E. T. 1827. C. P. 4 *Bing.* 214—S. P. KEATS *v.* HICK, E. T. 1821. C. P. 5 *Moore*, 629; *affirmed in error*, E. T. 1825. K. B. 4 *B. & C.* 69; S. C. 6 *D. & R.* 68.

Where the consideration is the giving up a stock and farm†.

DEBT on bond for the payment of 10*l.* to W. T. and A., his wife, and the survivor of them, in consideration of their having given up to the obligor (the defendant), the possession of a farm, together with certain carts, ploughs, harrows, and other implements in husbandry, as well as dairy utensils, to his sole use; it was objected, that this was a case within the 53 Geo. 3, c. 41, and the annuity ought to have been enrolled.

*Sed per Cur.*—The object of the annuity acts has always been the protection of needy persons who may have occasion to borrow money; and where such has not been the motive, the case is not within those statutes. The 53 Geo. 3, was passed to extend the operation of the 7 Geo. 3, to cases in which the grantor received goods at a nominal value, as the consideration for the purchase; and it was in order to check this practice that the legislature required annuities granted for money's worth to be registered, as well as those granted in the usual way for money. The present, however, is not a case of purchase within the meaning of the act; it is a mere surrender by parents to a son, in consideration of parental affection, for a small annuity. It was clearly a mere family settlement.

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FROST *v.* FROST, E. T. 1832. K. B. 3 *B. & Ad.* 612, n.

Or for a past debt, depending

THE grantor, being indebted to B., entered into a bond to pay an annuity to the widow of B. after his decease, during the lives of the

*The stat. 55 Geo. 3, c. 141, s. 2, enacts, "That within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect prescribed by the statute, with such alterations therein as the nature and circumstances of any particular case may reasonably require."

† Or relinquishing a business, *Crespigny* v. *Whittenoom*, 4 T. R. 790; or a school, *Hutton* v. *Lewis*, 5 Id. 639, S. P. 4 Bing. 215, see *Hudson* v. *Skinner*, 6 T. R. 596.

widow and himself. The Court held, as it might never become payable, and was only a better security for an existing debt, no memorial was necessary.

on a contingency.

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HICK *v.* KEATS, E. T. 1821. C. P. 5 *Moore*, 629; *confirmed in error*, E. T. 1825. K. B. 4 *B. & C.* 69; S. C. 6 *D. & R.* 68.

A MOTHER sold her trade and business, and advanced the money arising therefrom to her sons, to place them out in business; and it was afterwards agreed that her sons should grant her an annuity, which they did. It was held, by the Court of Common Pleas, and afterwards by the King's Bench, on a writ of error, that this annuity was not within the act, and did not require to be registered, it not appearing that the annuity was stipulated for at the time of making the advance; and therefore it must be taken to have been a voluntary grant on the part of the sons.

To make the consideration a pecuniary one, the advance of money must form a part of the original contract.

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CARTER *v.* SMITH, E. T. 1836. K. B. 6 *N. & M.* 480.

IN an action of covenant, the declaration stated, that differences subsisted between the defendant and his wife; and by reason thereof they had agreed to live apart from each other; and that the defendant had agreed with his said wife, to pay an annuity of 200*l.* to the plaintiff during her life, for her separate maintenance and support. The defendant pleaded, that no memorial of the deed had been enrolled, pursuant to 53 Geo. 3, c. 141.

Hence, a covenant to pay a wife an annuity as separate allowance need not be enrolled.

On demurrer, it was contended, that the deed in question was not a deed of that nature to require an enrolment, under the 53 Geo. 3, c. 141, being an annuity granted without regard to any pecuniary consideration, or money's worth. In *Blake* v. *Attersoll*, 2 B. & C. 875. *Bayley*, J., considered the 2nd sect. of the act as evidently contemplating the consideration paid in money, notes, or bills; and in *Tetley* v. *Tetley*, ante, p. 212, the Court of Common Pleas put the same construction upon the act. The Court gave judgment for the plaintiff.

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WALFORD *v.* MARCHANT, E. T. 1381. K. B. 2 *B. & Ad.* 315.

THE 10th sect. 53 Geo. 3, c. 141, enacts, "That it shall not extend to any annuity or rent-charge secured upon freehold or copyhold, or customary lands, in Great Britain or Ireland, or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the said grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant:—Held, to mean a charge directly operating on the land and that another annuity, secured by a warrant of attorney, and judgment entered up thereon, was not a charging within the meaning of the act.

The exemption in the 55 Geo. 3, c. 141, s. 10, of annuities charged upon land from enrolment applies only to such as are directly and specifically charged.

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DOE *d.* CHANDLER *v.* FORD, T. T. 1835. K. B. 5 *N. & M.* 209; S. C. 3 *Ad. & E.* 649.

AN annuity deed stated, that, at the time of the making thereof, certain barns, &c., and premises thereby demised, or intended so to

The covenant in the deed as to

the amount is not conclusive so as to dispense with the enrolment.

be, were of more than sufficient annual value to answer and pay the said annuity or clear yearly sum of 20*l.* thereby granted, over and above all repairs, charges, and incumbrances whatsoever, payable out of and affecting the same. In an action on the deed, no enrolment of the memorial of the annuity, under the 53 Geo. 3, c. 141, was produced, the plaintiffs relying upon the exception in the act, that nothing in that act should extend to any annuity or rent-charge, secured upon lands of equal or greater value, whereof the grantor was seised in fee simple or in fee tail in possession at the time of the grant, &c.

*Sed per Cur.*—Where a party relies upon an annuity deed, of which there has been no enrolment, it is incumbent upon him to bring himself within the exception of the 10th sect. of 53 Geo. 3, c. 141, and that the grantor was not estopped by his covenant from shewing that the property was not of the value; as if that were so, it would be permitting a party to evade the act of Parliament, by making any assertion in the deed that he chose.

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EARLE *v.* BROWNE, T. T. 1839. Q. B. 2 *P. & D.* 393.

So there must be an enrolment of a substituted annuity, though the deeds, &c., of the prior one which are to stand as a security, have been enrolled.

ON application to set aside annuity deeds, it appeared, in 1835, the defendant executed a deed of annuity, by which, in consideration of 1200*l.* he granted to the plaintiff an annuity of 180*l.*, and executed three warrants of attorney, as collateral securities. A memorial of this deed, and of the securities, was duly enrolled, pursuant to the stat. 53 Geo. 3, c. 141, s. 2. In 1837, the defendant having applied to the plaintiff to reduce the amount of the annuity, the plaintiff assented, and another deed was executed by the plaintiff and the defendant, by which the plaintiff covenanted to accept an annuity of 150*l.* in lieu of the former annuity of 180*l.*; and the defendant covenanted not to redeem the substituted annuity before the year 1842. It was also declared by this deed that the indenture of 1835, and the collateral securities for the annuity of 180*l.*, should stand as securities for the payment of the annuity of 150*l.*, in the same manner as if the annuity of 150*l.* had been covenanted to be paid by the indenture of 1835, in lieu of the annuity of 180*l.*; no documents were enrolled upon this second transaction.

*Per Cur.*—The 10th sect. of the 53 Geo. 3, c. 141, enacts, "That the act shall not extend to any voluntary annuity or rent-charge, granted without regard to pecuniary consideration or money's worth." And we are of opinion that this case is not within the 10th sect., as there is only a substitution of a different annuity with a different term of redemption. This annuity ought to have been enrolled.

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### (*b*) WITHIN WHAT TIME REQUIRED TO BE MADE.

FLIGHT *v.* BUCKERIDGE, M. T. 1825. C. P. 3 *Bing.* 215; S. C. 11 *Moore*, 28, *affirmed in error*, M. T. 1826, K. B. 6 *B. & C.* 49; S. C. 9 *D & R.* 113.

Although the memorial must be enrolled

IN this case two questions arose: First, Whether the memorial having been enrolled within thirty days after the execution of the annuity deed by the grantor, but enrolled before execution by the

defendant, as surety for the grantor, is good. Secondly, Whether, if the witnesses to the deed were accurately set out in the memorial, it is necessary to shew that such deed was executed by all the parties in their presence.

within thirty days, yet enrolment may be before the deeds are executed; and, if the witnesses to the securities are actually set out in the memorial, it is unnecessary to shew that the deed was executed by all the parties in their presence.

*Per. Cur.*—With respect to the latter question, we are all of opinion, that there is nothing in it. If it appeared on the face of the record that there were any other witnesses than those whose names are set out in the memorial, or that the defendant did not execute the deed in the presence of two witnesses, or in the presence of others than those named in the memorial, it would be a different question; as the memorial would not contain the names of all the witnesses. But, as two are set out, and properly described therein, that is sufficient. The other point, however, is more important, and on which alone the Court has entertained a doubt, viz. that the deed was enrolled before the execution by the defendant. The question then is, whether the statute imperatively requires the memorial to be enrolled after the execution of the deed by all the parties. The words of the act are, that, within thirty days after the execution of every deed, it shall be enrolled. But we are not bound by the words of the statute, but must construe it according to the intention of the legislature, and be governed by the spirit of the act. Now, the object of the legislature was, that the enrolment should not be delayed beyond thirty days from the execution of the deeds. But there is no reason why they should not be enrolled before they are executed; for, by a reference to the memorial, it may be seen who the parties were, and who executed the deeds, as well as the consideration, and the sum to be secured; and when the enrolment is made, a party may derive all that information. It therefore appears to us to be immaterial whether the memorial be enrolled before the deeds are executed, or not; for it only takes effect from the time of execution.

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### (*c*) Contents of.

Nash *v.* Godmond, M. T. 1830. K. B. 1 *B. & Ad.* 634.

An error in the memorial in describing the amount of the annuity is fatal*.

The memorial described the annuity as being 257*l.* instead of 237*l.* The variance, under the 53 Geo. 3, c. 141, s. 2, was holden fatal, and rendered the warrant of attorney, and all proceedings upon it, void; but the Court set aside the judgment, on payment of all costs, and of the motion as between attorney and client.

*See* 2 *Chit. Rep.* 34.

* The stat. 53 Geo. 3, c. 141, gives a form enumerating the following requisites in the memorial:—

1. *Date of Instrument.*—Where there are several, the dates of all must be stated, if they differ; a mere reference is sufficient; if they do not, Lord *Tenterden*, in his judgment, in *Buckeridge* v. *Flight*, 6 B. & C. 53; S. C. 9 D. & R. 113, says, "There is a column for the date of the instrument, that must mean the day inserted in the instrument as the date, and not the day on which it is executed; for if there are several parties, it can seldom happen that all will execute the deed on the same day."

2. *Nature of Instrument.*—The act will be satisfied by a description of the instrument in popular language, although that be not according to its strict legal effect; and, therefore, where an underlease was stated in the memorial as an assignment, it was held sufficient. (*Butler* v. *Capel*, 2 B. & C. 251; S. C. 3 D. & R. 485).

3. *Name of Parties.*—The meaning of this term is explained by the case of

CROWTHER *v.* WENTWORTH, E. T. 1837. K. B. 6 *B. & C.* 366; S. C. 9 *D. & R.* 286—S. P. BROWN *v.* LEE, T. T. 1827. K. B. 6 *B. & C.* 689; S. C. 9 *D. & R.* 700.

The words "grant of annuity" may be correctly applied to a deed conveying no property, but containing a release to the grantor of a former annuity.

THE deed was a grant of an annuity not secured upon any property; but a part of the arrangement between the parties was, that a former annuity should be released; and accordingly the deed contained a release of that annuity. The memorial in the column in the form prescribed by the act, which is headed "Nature of Instrument," called it "Grant of Annuity," without the addition of any other words.

*Per Cur.*—Here there is nothing but the word "grant" in the memorial; but we think the deed set out on oyer operates as a grant of an annuity; and that the word "grant" is a proper description of the nature of the instrument, within the meaning of the act of Parliament. The other columns will supply the names of the parties,

*Flight* v. *Buckeridge*, 6 B. & C. 49; S. C. 9 D. & R. 113, where the deed was memorialized before one of the parties had executed. It was contended, that that person was not a party until he had executed, and ought not to have been inserted in the memorial. But the Court of Common Pleas, (*Flight* v. *Buckeridge*, 3 Bing. 215; S. C. 11 Moore, 28), decided against this objection, and an appeal to the Court of King's Bench affirmed their judgment. (6 B. & C. 53; S. C. 9 D. & R. 113, supra 214). *Abbott*, C. J., in his judgment, said, "It is contended that no person is a party, within the meaning of the statute, until he has executed the deed. It is true he is not until that time a party chargeable; but still he may be a party; and I take the expression in the statute to mean all such persons as, upon reading the deed, appear to be parties." It was decided also, in *Yens* v. *Smith*, 3 B. & A. 206, that the memorial need not express the party in whose favour a warrant of attorney has been given; the schedule having pointed out the mode of memorialising a warrant of attorney and not requiring this particular.

4. *Names of Witnesses.*—It was decided that the memorial should contain the whole of the Christian name of the witness, the mere initial letter of the name not being sufficient, (*Cheek* v. *Jefferies*, 2 B. & C. 1; 3 D. & R. 185; *Metcalf* v. *Bowes*, 5 B. & C. 258; S. C. 7 D. & R. 773). But, according to the opinion of the legislature, this was not the correct interpretation of the statute, and an act was passed, the 7 Geo. 4, c. 75, to correct the effect of these decisions. (See stat. abridged post, 219).

5. *Name of Party beneficially interested.*—No case has occurred upon this column in the schedule of the statute.

6. *Name of Annuitant.*—It was objected to a memorial, 1st, That where an annuity was granted for a term of years determinable on lives, no notice was taken of the term of years, but the lives only were inserted; 2ndly, That no description nor residence was stated of the annuitants; and, 3rdly, That it did not appear whether the grant was for the joint lives, or extended to that of the survivor. The Court held all these objections to be groundless; that a literal attention was all that was necessary to give to the statute, which had been done in that case. (*Barber* v. *Gamson*, 4 B. & A. 281).

7. *Consideration.*—Only the pecuniary consideration actually paid need be stated. (See cases abridged, supra).

8. *The Amount of the Annuity.*—As in the consideration, so the statement of the amount is not to be affected by collateral or contingent circumstances, not actually regulating it at the time of the grant. Thus, a covenant to pay additional premium of insurance in the event of the grantor's going abroad, does not require insertion as part of the amount of the annuity. (*Wood* v. *Parrott*, 5 Moore, 63).

With reference to the mode of stating the amount, although perhaps a mere clerical mistake may not vitiate an annuity; yet where an annuity of 237*l.* was stated in the memorial in words to be 257*l.*, the Court of King's Bench held the error to be such as avoided the annuity deed. (*Nash* v. *Godmond*, 1 B. & A. 634).

A covenant, by a grantor, to insure his life, need not be stated. (See *Cane* v. *Lovelace*, 2 B. & Ad. 747). The penalty in a warrant of attorney given to secure the annuity, (*Baxter* v. *Samson*, 4 B. & A. 281), need not be set out in the memorial; there is no column for it, and there is no notice taken of it in the description of the contract given as an example.

the names of the witnesses, and the persons for whose lives the annuity is granted; and, when that information is supplied, the grantor may claim his copy under the 5th section. He will then see whether he has a copy of the instrument described in the memorial, whether it is attested by the same witnesses, and whether it is granted for the life of the person there described. We think it is not necessary to describe the deed as an indenture. It would make no difference if it were so described. If the word "indenture" were a material part of the description, the effect would be to prevent a party from having recourse to any other instrument.

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CANE *v.* LOVELACE, T. T. 1831. K. B. 2 *B. & Ad.* 767.

A statement of an assignment of dividends, and an annuity deed to secure the same, is a sufficient description in the memorial of a deed, reciting a contract to purchase an annuity, to be received out of the dividends of stock; and a covenant to pay the annuity, and to pay additional premium, if the grantor went abroad.*

A DEED recited a contract to purchase an annuity, to be secured out of the dividends of stock; and the grantor covenanted to pay the annuity, and assigned the dividends to the grantee. The memorial which described the instrument to be an assignment of dividends, and an annuity deed to secure the same, was held, by the Court, to be sufficient.

*Parke*, J., observed—"The nature and effect of the instrument are described, if not quite accurately, yet with as much particularity as the present statute requires; giving it the same latitude of construction as was used in *Butler* v. *Capel*, 2 B. & C. 251, and *Crowther* v. *Wentworth*, ante, p. 216."—Held, also, that it was unnecessary to notice in the memorial a covenant, that, if the grantor went abroad, the additional expense of insuring his life might be retained out of the dividends which were assigned for paying the annuity; and, if insufficient, that the grantor should make up the deficiency; and that the memorial describing the deed as "assignment of dividends and annuity deed to secure the same," was not such an incorrect description as to invalidate the memorial.

*See Wood* v. *Perratt*, 5 *Moore*, 63.

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FAIRCLOTH *v.* GURNEY, H. T. 1833. C. P. 9 *Bing.* 622; S. C. 2 *M. & S.* 822; S. C. 1 *D. P. C.* 724—S. P. JOHNSON *v.* TWEED, T. T. 1832. K. B. 1 *D. P. C.* 459.

Nor is a covenant to pay the premium of insurance necessary to be stated in the memorial; and describing the consideration as notes, when the deed states it to have been in notes and sovereigns, held not

ON motion to set aside the securities connected with this annuity, it appeared that the plaintiff, having contracted with the defendant for the purchase of an annuity of 80*l.*, to be secured partly by the transfer of a policy of insurance on the life of the defendant, the grantor, the amount of the annual premium upon the policy was in the annuity deed added to the annuity of 80*l.*, making the total annuity granted 113*l.* 19*s.* 6*d.*, and the annual premium on the policy the grantee of the annuity covenanted to pay.

The annuity deed recited the considerations for the annuity to have been paid in notes and sovereigns. The memorial of the consideration made no mention of the insurance, and expressed the payment to have been in notes only.

The Court were of opinion—1st, That the covenant to pay the an-

* Where the annuity was charged on stock, standing in the names of trustees, and the grantee made an assignment thereof, without notice to the trustees, and subsequently granted a second annuity, of which a memorial was enrolled, and notice given to the trustees:—Held, that the latter was to be preferred. (*Hulton* v. *Sandys*, 1 Y & J. 602.)

a material variance*.

nual premium of insurance was not a pecuniary consideration, or necessary to be specified in the memorial of the annuity; and that the annuity was properly described in the memorial as an annuity of 113*l.* 19*s.* 6*d.*

And, 2ndly, That it was no objection that the deed stated the consideration to have been paid in notes and gold, and the memorial stated it to have been in notes only.

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FEW *v.* BACKHOUSE, M. T. 1838. K. B. 1 *P. & D.* 34.

So, a nominal consideration expressed where paid to the surety, need not be stated.

IN covenant on an annuity deed, it was objected that the memorial was insufficient,, as in the column containing the statement of the consideration paid, there was only an entry of 1000*l.*, which was, in fact, the sum advanced for the annuity; but there was a surety for the payment of the annuity; and a consideration of 10*s.* was stated to have been paid to him, but it was not noticed in the memorial.

But the Court overruled the objection, and said, "That was not the consideration for the grant of the annuity, which is to be taken from the granting part of the deed."

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RICHARDSON *v.* TOMKIES, T. T. 1832. C. P. 9 *Bing.* 51; S. C. 2 *M. & Scott*, 56.

If the warrant of attorney be memorialized, it is not essential to insert the judgment entered up thereon.

A JUDGMENT on a warrant of attorney was one of the securities for the payment of an annuity. The judgment was referred to as being entered up. It was argued that the judgment should have been memorialized.

*Sed per Cur.*—A judgment is matter of record, and does not require those precautions against secrecy which the legislature has provided for transactions attended with less notoriety; and in the form of memorial given by the statute, the word "judgment" does not appear. In the present case, the memorial recites that judgment has been entered up; and if it be necessary to include the judgment in the memorial, it may be a question, whether it is not sufficiently done by such a reference. In *Ranger* v. *Earl of Chesterfield*, 3 *M. & S.* 2, it was held, that if a bond and warrant of attorney and indenture be made to secure an annuity, the memorial of the bond and warrant of attorney need not express for whose life the annuity was granted; and if it be expressed in the memorial of the indenture which recites the bond and warrant of attorney for whose life the annuity was granted, that is sufficient.

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FLIGHT *v.* LORD LAKE, T. T. 1835. C. P. 2 *Bing. N. S.* 72; S. C. 2 *Scott*, 126.

The omission of the word "life" in the memorial does not vitiate the securities.

IN the memorial of a deed of annuity enrolled in the Court of Chancery, according to the statute 53 Geo. 3, c. 141, s. 2, the record was in these words, "person for whose (omitting the word 'life') the annuity was granted."

In an action to recover arrears of the annuity, the plaintiff had a

* So, where the name of one of the parties on whose life the annuity was granted, was William Falconer Walker, and in the memorial he was named William Walker:—Held, not to vitiate the annuity. (*Hulton* v. *Sandys*, 1 Younge, Ex. Eq. 602.)

verdict. On motion to set it aside, on the ground that the memorial was imperfect, as it did not set forth for whose life the annuity was granted—

*Per Cur.*—When we look at the document altogether, it surely is impossible not to see that it was the clear intendment of the parties that there should be a memorial of the annuity, in form as required by the statute. There cannot be the slightest doubt as to the name of the person for whose life the annuity was given. The rule should be refused.

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DOE *v.* BROMLEY, E. T. 1825. K. B. 6 *D. & R.* 292.

The memorial must state Christian names of witnesses*.

IN ejectment for the premises on which the annuity was secured, on the production of the deed it appeared that the memorial described one of the subscribing witnesses as "G. M. Dance, of Cursitor-street, in the county of Middlesex, attorney at law," without

* But, according to the opinion of the legislature, this was not the correct interpretation of the statute; and an act of Parliament accordingly was passed, the 7 Geo. 4, c. 75, to correct the effect of these decisions. It begins by reciting the requisites of the stat. 53 Geo. 3, c. 141, and continues to recite, that, 'whereas it frequently happens that the names of witnesses to grants of annuities, or other assurances, are unknown to the grantees thereof, or their solicitors or agents, otherwise than as they appear by the subscriptions of such witnesses to the attestations of the executions of such grants or assurances; and it might greatly endanger the validity of any such assurance, if any name were inserted in the memorial thereof as the name of any such witness, in any other manner than as the same appears, signed by such witness as attesting the execution of any such assurance; and, whereas a very great number of memorials of grants of annuities have, since the passing of the said act, been enrolled, in which the surnames of witnesses to the deeds, instruments, or assurances, specified in such memorials have been inserted, together with such initial letter, or abbreviation of the Christian names of such as appeared subscribed to the attestation by such witnesses of the execution of such deeds, instruments, or assurances, without stating, at full length, the Christian names of such witnesses; and, whereas doubts have been entertained whether, according to the true construction of this act, it is necessary to the validity of any such grant or other assurance, that the Christian as well as surname of all the witnesses to such deed, grant, or other assurance, should be inserted in the memorial thereof, in any other manner than as the same may appear subscribed to the attestation of such deed, grant, or other assurance, by such witnesses respectively; and, in order to remove such doubts,' it is enacted and declared, "That, by the said act of the fifty-third year of the reign of his said late Majesty, no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is or are required in the memorial thereof, besides the names of all such witnesses, as they shall appear signed to the attestations respectively of the execution of such deed, bond, instrument, or other assurance; and so the said act shall be deemed, construed, and taken." The other points in the construction of this column, in which the Court of King's Bench, according to the opinion of the legislature, misinterpreted the statute, is so fully explained in the preamble to the act of 3 Geo. 4, c. 92, that it may well be to set it forth at length. It is dated 29th July, 1822, and begins by reciting the requisites of the 53 Geo. 3, c. 141, and continues, "that, whereas the form or effect to which such enactment refers is expressed in several columns, at the head of one of which are the words, 'Names of Witnesses,' and underneath, as applicable to indentures of lease and release, the letters and words 'E. F., of ——', 'G. H., of ——', and, as applicable to a bond and warrant of attorney to confess judgment, the letters 'E. F.' 'G. H.,' without the word 'of;' and whereas the words of enactment, referring to such form, express only that a memorial of the names of all the witnesses to every such deed, bond, instrument, or other assurance, as therein mentioned, should be enrolled as directed by the said act, without providing that any description of the witnesses should be given in such memorial, except as such form is thereby referred to; and such form does not provide that any description should be added to such names, except by the addition of the word 'of' to the letters 'E. F.' and 'G. H.,' as aforesaid, as applicable to indentures of lease and

setting out his Christian names at full length, in compliance with the 53 Geo. 3, c. 141, s. 2.

*Per Cur.*—The Christian names must be stated; suppose there are two persons of the same surname subscribing witnesses to the deed, one of whom is called by his Christian name John, and the other Jacob, it cannot be said that it would be sufficient to give in the memorial merely the initials of their Christian names. There may be five or ten persons in existence to whom the same initial may apply. Those, therefore, who are interested in knowing the true names of the subscribing witnesses, are left completely in doubt as to what person is meant by the initial.

release; and whereas, in consequence of such indistinct enactment, it may be doubtful whether it was the intention of the legislature to require any, or, if any, what description, to be added to the names of witnesses in the memorial of any deed, instrument, or assurance to be enrolled as aforesaid; and whereas a very great number of memorials of grants of annuities have, since the passing of the said act, been enrolled, in which the names of the witnesses to the deeds, instruments, or assurances, specified in such memorials, have been inserted without the addition of the place of abode of such witnesses; and it has been inferred, from the use of the word 'of' after such letters 'E. F.' and after such letters 'G. H.,' as aforesaid, that it was necessary to describe each of such witnesses in such memorial as of some place; and, in consequence thereof, some grants of annuities made since the passing of the said act have been, in proceedings in summary applications to Courts of justice, which cannot be reviewed in any superior Court, deemed null and void, on the ground, that no description of the place of abode of the witnesses to some or one of the deeds, instruments, or assurances, by which such grants of annuities have been made, had been inserted in the memorials or memorial thereof, enrolled as directed by the said act; and whereas doubts have been entertained whether the construction so put on the said act is the true construction thereof, more especially as the same is so far penal as it renders deeds, instruments, and assurances, of which memorials have not been enrolled in pursuance of the said act, null and void; and the provisions in the said act are not so clear and explicit as the same ought to have been under such circumstances, and the parties claiming under grants of annuities may have been thereby misled and induced to conceive that it was not necessary, under the provisions of the said act, to insert in the memorial of any deed, instrument, or assurance to be enrolled as aforesaid, the place or places of abode of the witness or witnesses to such deed, instrument, or assurance, or any more than the name or names of such witness or witnesses, there being no words in the said act expressly requiring any more to be so inserted, nor any words from which it could be inferred that any more was required to be so inserted, except the word 'of,' after the letters 'E. F.' and 'G. H.' respectively, with reference to one species of assurance inserted in the form of the memorial before mentioned; and it is expedient to remove all doubts touching the construction of the said act, with respect to so much of the memorials required by the said act to be enrolled, as relates to any description of the witness or witnesses to any deed, instrument, or assurance: it was therefore enacted and declared, That, by the said act of the 53rd year of the reign of his late Majesty, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses; and so the said act shall be deemed, construed, and taken."

By the 4th section, however, it is provided, that the act "shall not extend or be construed to extend to revive or give effect to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge hath been already granted, so far as the same hath been adjudged, declared, treated, or deemed void by any judgment, decree, action, suit, or proceeding at law or in equity, or by any other legal or equitable means whatsoever; nor shall this act affect or prejudice any suit or proceeding at law or in equity, commenced on or before the 31st day of May, 1822, and now depending, upon the ground of an alleged defect in the memorial thereof, in not describing the witnesses thereto otherwise than by his, her, or their name or names, for avoiding any such deed, bond, instrument, or other assurance."

METCALF *v.* BOWES, H. T. 1826. K. B. 5 *B. & C.* 258; S. C. 7 *D. & R.* 773—S. P. CHEEK *v.* JEFFERIES, T. T. 1823. K. B. 2 *B. & C.* 1—METCALFE *v.* STRATHMORE, 8 *D. & R.* 773.

THE 53 Geo. 3, c. 141, s. 2, requires that the Christian names of the subscribing witnesses to the securities of an annuity should be inserted in the memorial. On motion, it appeared that the warrant of attorney given was not so memorialised: the Court set it aside, and the judgment thereon.

And, if only initials be inserted, the securities will be set aside*.

*See Cheek* v. *Jefferies*, 2 *B. & C.* 1; 3 *D. & R.* 185.

## IV. REGISTERING IN REGISTRY COUNTIES†.

COTTLE *v.* WARRINGTON, T. T. 1833. K. B. 5 *B. & Ad.* 447.

A WARRANT of attorney had been given by the defendant, who was a beneficed clergyman in the North Riding of Yorkshire, to secure the payment of an annuity. It was urged, that the judgment entered up by the plaintiff, not being registered, was fraudulent and void, as against registered judgments of other creditors; but the Court overruled the objection, holding, that it did not require registration, for that the payment may be enforced by sequestration. The benefice is not affected by the judgment.

A judgment entered up on a warrant of attorney, given by a beneficed clergyman in a registry county, need not be registered.

## V. RECOVERING BACK CONSIDERATION MONEY.

DAVIS *v.* BRYAN, E. T. 1827. K. B. 6 *B. & C.* 651; S. C. 9 *D. & R.* 726.

ACTION for money had and received by plaintiff as executor of W. Griffiths. It appeared that W. Griffiths had, in 1814, contracted and agreed to purchase of the defendant an annuity of 24*l.* for the life of W. Griffiths, for the price of 300*l.*, which was then paid by W. Griffiths to the defendant for the said annuity. No

If a void annuity be not vacated while it is executory, the grantee cannot, after the

* But the court will not, after a long lapse of time, set aside a warrant of attorney on such an objection. (4 D. & R. 344).

† Under the stat. 2 Ann. c. 4, (West Riding of County of York); 6 Ann, c. 35, (East Riding); 8 Geo. 2, c. 6, (North Riding); and 7 Ann. c. 20, (Middlesex), where a rent-charge is granted out of any lands, tenements, or hereditaments, situate in either of the counties of York and Middlesex, a memorial thereof must be registered, according to the form and at the places specified in those acts; otherwise, such grant will be void against any subsequent purchaser or mortgagee of the lands charged.

But, as the real object of these acts was to afford notice that the lands were subject to the incumbrance, which is registered, it has been held in equity, that, where the subsequent purchaser or mortgagee has had notice, express or implied, of any such incumbrance, though the same have not been registered, yet he shall not take advantage of these statutes, but shall be bound to admit the priority of the charge.

Thus, in *Cheval* v. *Nicholls*, 2 E. C. A. 64, one granted an annuity and charged it on lands in Middlesex; his agent, who knew of the deed, and had paid part of the annuity to the grantee, afterwards purchased the land. The deed not having been registered, the purchaser refused to pay the rent. But, on a bill filed in the Exchequer, he was decreed to pay it, on the ground that he had notice of the prior incumbrance, and that it was contrary to equity that a person who had full knowledge should be relieved against a prior purchaser.

death of the annuitant, recover back the consideration.

memorial of this instrument was enrolled, no other security for the said annuity was given by the said defendant, or applied for by W. Griffiths. The defendant was able to have given the freehold security, if it had been required. W. Griffiths died in the month of December, 1823; and, from the time of the contract for the annuity to the time of his death, the annuity was regularly paid to him, half-yearly, by the defendant, and frequently paid in advance. The defendant and W. Griffiths were on terms of great intimacy, and the defendant often lent him money, the balance of which had been paid to the defendant, since W. Griffiths' death, by the plaintiff.

The question for the consideration of the Court was, whether plaintiff was entitled to recover from the defendant, in this action, money so paid by the said testator to the defendant.

*Per Cur.*—The contract was not void, though the securities might have been; but the contract, having been performed, rested no longer in fieri, and therefore the action cannot be maintained.

*See Doug.* 468; 1 *T. R.* 732; 2 *B. & P.* 467; 3 *Taunt.* 277; 6 *East,* 241.

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CURTIS *v.* BLOW, E. T. 1831. K. B. 2 *B. & Ad.* 426.

But the vendee of an annuity may recover back the purchase-money if no sufficient title be shewn.

TESTATOR bequeathed a sum in Long Annuities, to be applied, first, to the payment of his debts, and a certain portion of it, afterwards, to vest in trust for his daughter. On his death, a bill in Chancery was exhibited against his executors for an appropriation of the fund for the daughter's benefit; the executor admitted assets, and a decree was obtained for the appropriation within two years of the death of the testator. It was not referred to a Master in Chancery to ascertain whether there were any debts outstanding, nor did it appear whether or not this was the fact. The daughter's annuity being afterwards sold, the purchaser brought an action to recover back the deposit-money, on the ground that no title could be made. On a case stating these facts, the Court held, that there was no sufficient title established, and that, at least in the absence of a Master's report, it lay upon the vendor to shew that there were no debts outstanding which could affect the annuity; and the plaintiff was entitled to recover.

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COWPER *v.* GODMOND, E. T. 1833. C. P. 9 *Bing.* 748; S. C. 3 *M. & Scott,* 219.

Where an action is brought to recover back money paid for an annuity, which is set aside, the Statute of Limitations runs from the time of the application to set aside, and not from the original payment.

AN annuity, granted in May, 1824, became invalid from a defect in the memorial, and the security was set aside by rule of Court, in Michaelmas Term, 1838, and an action was brought to recover the balance of the consideration. The Court held, that, as the causes of action were the original advance and the grantor's election to avoid the annuity, the latter of which was only complete upon seeking and obtaining the rule to set it aside, the Statute of Limitations then only began to run, and, consequently, was no bar.

*See Waters* v. *Mansell,* 3 *Taunt.* 56, *and* 6 *Esp.* 98.

## VI. SUMMARY JURISDICTION OF COURTS OVER*, AND WHEN VACATED AND SET ASIDE.

### Storton *v.* Tomlins, H. T. 1825. C. P. 2 *Bing.* 475; S. C. 10 *Moore*, 172.

The Courts can only interfere summarily where there is a warrant of attorney or some instrument which forms part of their record; and the other securities will not be affected by the interposition.

Motion to set aside warrant of attorney and other securities: 1st, on the ground that one of the grantors was an infant at the time of the grant; 2ndly, that there were, in fact, two grantees, although it appeared on the face of the deed that there was only one; and, 3rdly, that the memorial had not been properly enrolled, according to the stat. 17 Geo. 3, the annuity having been granted previously to the passing of the 53 Geo. 3, c. 141.

*Per Cur.*—This is an application to us to set aside the deed and other securities on which the annuity in question is founded; but we can only exercise a jurisdiction over the warrant of attorney and judgment which has been entered up thereon, as we have an equitable jurisdiction over the latter, but none as to the deeds, except in cases of contracts with infants under the 6th section of the statute; and all the previous authorities warrant this conclusion.

* The legislature, in order to prevent the frauds and inconveniences so frequent in annuity transactions, has given each of the superior Courts summary jurisdiction in certain cases. The 17 Geo. 3, c. 26, now obsolete, was the first enactment; the act now in force is the 53 Geo. 3, c. 114. Sect. 2, requiring the memorial of the transactions, enacts, "That, within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, after the 14th July, 1813, be granted for one or more life or lives, or for any term of years, or yearly estates, determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, and of the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require; otherwise, every such deed, bond, instrument, or other assurance, shall be null and void, to all intents and purposes." And the form of the memorial, in appropriate columns, is then described.

The 5th sect. gives a Judge of King's Bench or Common Pleas (omitting Exchequer and Courts of Equity) summary power, by summons and order, to compel the delivery of the copy of the deed to any applicant, and power to examine it with the original.

Sect. 6 enacts, "That if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed, without being first paid, or, if such consideration is expressed to be paid in money, but the same, or any part of it, shall be paid in goods, or, if the consideration, or any part of it, shall be retained on pretence of answering the future payments of the annuity or rent-charge, or any other pretence, in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the Court in which any action shall be brought for payment of the annuity or rent-charge or judgment entered, by motion to stay proceedings on the action or judgment; and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the Court to order every deed, bond, or instrument, or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.

The statute contains other enactments, declaring void all annuities as to in-

FINLEY *v.* GARDNER, H. T. 1827. K. B. 6 *B. & C.* 165; S. C. 9 *D. & R.* 207.—Id.

Neither the lapse of time, nor the death of the grantee, nor the grantee's acquiescence in the agent retaining part of the consideration money, will prevent the Court interfering to set aside the annuity.

RULES had been obtained to set aside the judgment in these causes. In the year 1818, the defendant, being desirous to raise a loan, his attorney applied to one Dufour, who introduced him to Thomas, an attorney, as being a person having the means of procuring the loan. That the attorney of the defendant accordingly treated with Thomas, who ultimately agreed to procure him the loan of 3000*l.* on annuity, at somewhat more than seven years' purchase, on the following conditions:—First, that 10 per cent. (300*l.*) should be allowed for law expenses; and, secondly, that a sum equal to the first half year's annuity should be deposited with the defendant's attorney, and by him lodged in one of the Cambridge banks, in his own name, and remitted, from time to time, as the quarterly payments became due. Thomas, at the same time, informed the defendant's attorney, that Dufour would expect five per cent. (150*l.*) for his commission. The defendant, in his affidavit, went on to state, that, being greatly distressed, he submitted to these terms, and accordingly the treaty was carried into effect by his granting five annuities to different persons at the before-mentioned rate, for various considerations, amounting together to the sum of 3000*l.*, with five warrants of attorney, authorizing a judgment for securing such annuity. That, on the execution of the deeds, Thomas, as the attorney or agent of the various grantees, paid the defendant 3000*l.*, those persons being present, Thomas, the defendant, his attorney, and Dufour. That on receiving the 3000*l.* he, in pursuance of the agreement, immediately paid 300*l.* to Thomas for the law expenses, 150*l.* to Dufour, and a sum equal to the first year's annuity to his own attorney. The defendant's attorney further stated that he

fants, and relative to extortion of annuity brokers, and exceptions with respect to annuities charged on property of adequate value, whereof the grantor was seised in fee, &c.

In considering the practical application of this statute, the distinction between the general jurisdiction of the Court over warrants of attorney, and the particular power given by the 6th section to the Court to interfere on summary motion, should be constantly kept in view. The 1st section declares the instruments void in cases where there ought to be, but has not been, a proper memorial; but that section gives the Court no power to interfere summarily to set aside any deed or instrument on account of a defect in the memorial; and therefore, when that is the objection, although the deeds are void, yet no motion to the Court of Law can be made, excepting to set aside a warrant of attorney constituting one of the securities; and then that summary motion is founded principally upon the common law jurisdiction of the Court over warrants of attorney, authorizing a judgment in that Court. But when a case can, by affidavits, be brought within the precise terms of the 6th sect., then a Court of Law has power, (at least when an action is depending), to order the deeds and all other securities to be cancelled; but which enactment is not imperative, but merely discretionary, to vacate securities either absolutely or on terms, according to the circumstances and justice of each case. And even where too large a sum had been retained by the grantor's attorney, with his knowledge, the Court refused to set aside the securities altogether, but referred the matter to the Master, to report what part of the sum charged for costs should be deducted.

Courts of Equity have more extensive jurisdiction to cancel annuity deeds than a Court of Law; and, therefore, in some cases, especially those where the deeds constitute a cloud over or incumbrance upon an estate, it may be preferable to file a bill in a Court of Equity in the first instance; because, as we have seen, Courts of Law cannot order the deeds to be cancelled, excepting in the few instances enumerated in the 6th sect., and are even then frequently reluctant to interfere. (10 Ves. 218; 19 Ves. 131).

also, in pursuance of the agreement, paid the last-mentioned sum into one of the Cambridge banks; and from time to time remitted to Thomas the quarterly payments, on that first year's account, as they respectively became due. The defendant, to account for his delay in not having made earlier application to the Court, stated, that he was not in circumstances sufficient to enable him to repay the principal money with the lawful interest, until the death of his father, which had taken place very recently.

The Court set aside the annuities, on the terms of the defendant paying the principal and interest, at 5*l.* per cent., with such costs and brokerage as the Master should think reasonable, and the costs of the application.

*See* 1 *Bing.* 287; 8 *Moore*, 302; 6 *Id.* 495; 4 *Bing.* 26; 12 *Moore*, 113.

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WILLIAMS *v.* HOCKIN, 8 *Taunt.* 435—S. P. *Ex parte* LEWIS, M. T. 1834. K. B. 2 *A. & E.* 135.

So, after lapse of six years, where consideration money was not the property of the party described in the securities.

THIS was a motion to set aside securities for an annuity, which was granted, although six years had elapsed since the transaction took place, upon the ground of the consideration money not being the property of the party described in the securities, but the property of C.; and the name of the person in whose behalf the money was paid not having been correctly stated in the receipt, C. being alive, and having claimed the consideration money, and stated the annuity to be his property.

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CALTON *v.* PORTER, M. T. 1824. C. P. 2 *Bing.* 370; S. C. 9 *Moore*, 703—S. P. GORTON *v.* CHAMPNEYS, C. P. 1 *Bing.* 287; S. C. 8 *Moore*, 302—S. P. MENCE *v.* HAMMOND, H. T. 1822, C. P. 6 *Moore*, 491—S. P. HENRY *v.* TAYLOR, T. T. 1825. C. P. 3 *Bing.* 177; S. C. 10 *Moore*, 588.

The annuity may be vacated for unreasonable charges, although the grantee may be ignorant of the exaction.

IN this case it appeared, that, previous to the execution of the securities, the defendant was indebted to H. and G., the agents of the grantee, in 90*l.*, and that G. demanded payment of that sum from the defendant, and told him that he must pay him out of the sum of 630*l.*, it being the consideration or purchase-money of the annuity of 105*l.*; and that the defendant must also pay H. and G. the further sum of of 50*l.*, for their costs and charges of preparing and perfecting the securities for the annuity, to which the defendant agreed; that G. then, as agent of the plaintiff, should pay the defendant the sum of 630*l.* in Bank of England notes, and handed the same over to him. That, immediately upon the execution of the deed and warrant of attorney by the defendant, he returned to G. 90*l.*, and for H. & G. 50*l.*, being the costs and charges of preparing the securities for the annuity. It also appeared that the treaty was entirely negotiated, and the whole transaction of the grant of the annuity conducted and carried into effect, by H. and G., or one of them, as the agents of the plaintiff; and that the defendant had been informed, that a fair and reasonable bill for preparing and perfecting the said several securities would not exceed the sum of 30*l.*

*Per Cur.*—Here H. and G., during the existence of their agency, not only demanded a sum stated to be due to them from the grantor, but a large sum for expenses; and it is sworn, that the grantor, fearing the annuity would not otherwise be carried into effect,

submitted to it; they had no right to extort it from him at the time the deed was executed, and the plaintiff must be responsible for their acts. The Court must exercise an equitable jurisdiction in cases of this description, and it is the duty of a principal to keep a strict eye over his agent and see how he is conducting himself.—*Rule absolute.*

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JONES *v.* SILBERSCHILDT, M. T. 1826. C. P. 4 *Bing.* 26; S. C., by the name of CHAPPELL *v.* SILVERSCHILDT, 12 *Moore,* 113.

Several annuities substantially one may be set aside for the retention of part of the consideration money by the agent of the grantee.

S. HAVING occasion to raise 2800*l.* by way of annuity, desired the annuities to be divided into three; the consideration for all three was paid at one time and place, to one person who was agent to all the grantees, and he retained 300*l.* for the expenses of all the three annuities:—Held, that all three might be set aside on equitable terms, on account of this deduction, although the 300*l.* was retained in a bank note, which formed part of the consideration money of only one of the grantees.

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NASH *in Re,* M. T. 1830. C. P. 4 *M. & P.* 793.

But an annuity will not be set aside on ground of usury, where, within thirty days after the death of three lives, an insurance is to be effected on a fourth life.

ON motion to set aside an annuity on the ground of usury, it appeared, that an annuity of 120*l.* was granted for four lives, in consideration of 1000*l.*, the grantor covenanting to insure that sum within thirty days after the falling in of the third life.

*Per Cur.*—The point is, whether the advance of money in this case comes within the statute of Anne, as being a loan of money, upon which, either directly or indirectly, more than 5*l.* per cent. has been stipulated for. The general rule is, that where the money advanced is hazarded, it is no loan. Where there is any uncertainty as to the return of the principal, it amounts only to a question of contract. It is impossible to say that there has not in this case been considerable hazard. We think that the rule for setting aside this annuity should be discharged.

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LOUKES *v.* HOLBEACH, M. T. 1827. C. P. 4 *Bing.* 419; S. C. 1 *M. & P.* 126.

A party outlawed in one Court cannot be heard in another to set aside an annuity.

THE defendant, the grantor of an annuity, was sued in the Court of King's Bench for non-payment of arrears, and was outlawed in the action; he applied to this Court to set aside the securities on which the annuity was founded.

*Per Cur.*—He cannot be heard until after the reversal of the outlawry; because there does not appear to be any case in which it has been established, that, under such circumstances, a defendant can move for a rule in any matter: but, as it is so clearly ascertained that a man outlawed cannot maintain an action, he being, by his contumacy, out of the king's protection, and being allowed no privilege or benefit from that law of which he is a violator, and to which he refuses to be amenable, we think he cannot move the Court any more than he can sue.

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REG. GEN. M. T. 1829. C. P. 6 *Bing.* 347—S. R. K. B. 2 *East,* 563.

The rule nisi must state the objection in-

IT is ordered, that where a rule to shew cause is obtained in this Court, for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the coun-

sel, at the time of making such rule absolute, shall be stated in the said rule to shew cause.

tended to be insisted on.

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COLEBROOKE *v.* LAYTON, T. T. 1833. K. B. 1 *N. & M.* 384—S. P. KIRLEW *v.* BUTTS, E. T. 1831. K. B. 2 *B. & Ad.* 736, n.

IN this case, the application to set aside the judgment had failed, (vide ante, p. 209).

*Littledale*, J.—The rule must be discharged with costs. It is in the nature of an application to the Court on the ground of irregularity.

An unsuccessful application to set aside the judgment to secure an annuity will be discharged with costs.

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FAIRCLOTH *v.* GURNEY, H. T. 1833. C. P. 9 *Bing.* 456.

ON motion to set aside an annuity, the Court declined to hear the rule, upon its appearing that the rule had not been obtained on behalf of the grantor, but on behalf of a party who had purchased the annuity from an assignee, and who raised objections to avoid completing his purchase.

*See ante*, 208.

Applications to set aside should be made at the instance of grantor—qu.*

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## VII. RIGHTS OF PRINCIPAL AND SURETY.

BROWN *v.* LEE, E. T. 1827. K. B. 6 *B. & C.* 689; S. C. 9 *D. & R.* 700.

B., ONE of the sureties, by arrangement with W., the assignee of an annuity, became entitled, after payment of a certain sum and interest, to receive the annual payments; and the Court held, that, as between the sureties, the annuities were to be deemed subsisting, and not to release the other co-sureties from liabilities to contribute in respect of payments, which B. was compelled to make to the assignee; nor was the liability varied by the fact, that stock originally assigned as a further security for the annuity, was ultimately to revest in B.

One of several sureties cannot claim an advantage from any security which is given by his co-surety, nor object if that security be taken away.

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PENNY *v.* FOY, E. T. 1828. K. B. 2 *M. & R.* 181. S. C. 8 *B. & C.* 11.

AN indemnity bond, given by the grantor of an annuity to his surety, was conditioned, that the defendant, the principal, should pay a named sum to A. B., and should also indemnify the surety, the plaintiff, against his being called upon by A. B.

In an action on the bond, it appeared that the defendant had made default in paying A. B.

*Per Cur.*—The case of *Toussaint* v. *Martinnant*, 2 T. R. 100, shews, that where there is an indemnity bond, the surety must shew that he is damnified; and that when he is, the bond becomes forfeited. But here the party engaged to pay the annuity, and the indemnity is only another of the conditions. He did not pay the annuity, and therefore the bond became forfeited. The surety was entitled to have the annuity paid; and he has a remedy upon this bond, which he has a right to put in suit, upon default being made in payment of the annuity.

*See* 1 *Stark*, 329.

A., a principal, gives B., his surety, a bond, conditioned to pay C. an annuity, and indemnify B.—Held, that B. may sue A. on non-payment by A. to C., though B. has not been called on to pay.

* See *Newland* v. *Watkins*, 9 Bing. 113. (*Garrood* v. *Saunders*, 6 T. R. 403; Id. 737; Lumley, 114). The Court will not grant a copy of an annuity-deed, warrant of attorney, &c., unless it appears there was only one part or copy made at the time. (*Williams*, J.—*Griffin* v. *Smythe*, E. T. 1840, B. C., 8 D. P. C. 490).

HOCKEN *v.* BROWN, E. T. 1838. C. P. 4 *Bing. N. S.* 400; S. C. 6 *D. P. C.* 634; 6 *Scott*, 194—S. P. ABBOTT *v.* BRUERE, T. T. 1839. C. P. 7 *Scott*, 753.

An action will lie for arrears paid by the surety against his principal after his principal is discharged under the insolvent act*.

IN this case the question was, whether a surety in a joint and separate warrant of attorney for the payment of an annuity, is relieved from his responsibility to the grantor, by the discharge, under the Insolvent Debtors' Act, of his principal, the grantor.

*Per Cur.*—The annuity creditor has a vested right to sue the surety upon the non-payment by the grantor. Here the grantor was insolvent and unable to pay it; and it is said that the creditor is deprived of proceeding by action against the surety, because the insolvent had been discharged under the statute. But we should not come to this conclusion unless we are compelled by the most express words. The 51st section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, which extends the discharge to any sum of money which shall be payable by an annuity, &c., concludes with these words:—"And such creditor or creditors shall be entitled, in respect of such value, to the benefit of all the provisions made for the creditors by this act, without prejudice, nevertheless, to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under this act." Now, there is nothing in the clause which leads to the conclusion that the surety is discharged. The exception leads to the opposite inference, and therefore he may sue his principal.

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FREEMAN *v.* BURGESS, M. T. 1827. C. P. 1 *M. & P.* 91; S. C. 4 *Bing.* 416.

So, a surety may arrest his principal for arrears paid by him after the former has taken the benefit of the insolvent act.

THE defendant, the grantor of an annuity, who had been discharged under the Insolvent Act, 1 Geo. 4, c. 119, was arrested by the plaintiff, his surety, for certain arrears of the annuity, which had become due after his discharge, and which the plaintiff, as surety, had been obliged to pay. On motion to discharge the defendant out of custody, on his entering a common appearance—

*Per Cur.*—All the cases we have been referred to, tend to shew that this action has been well brought; but it has been contended, that the defendant was not liable to be held to bail. We are, however, of opinion, that this is not a case for the interference of the Court on motion; for if there be any defence, it may be put on the record. The case of *Page* v. *Bussell*, 2 M. & S. 550, is precisely in point; and there it was determined that an action of this nature is maintainable. The authority of that case was recognised by *Flanagan* v. *Watkins*, 3 B. & Ad. 186; S. C. in error, 8 B. Moore, 486; S. C. 1 Bing. 413; and the decision of the Court of King's Bench was affirmed by the Exchequer Chamber in error.

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CARTWRIGHT *v.* COOKE, T. T. 1832. K. B. 3 *B. & Ad.* 701.

An agreement between principal and surety, whose affairs are embarrassed, that the surety shall pay the annuity, is binding.

A. AND B., brothers, were principal and surety in an annuity-bond. By an agreement afterwards executed between them and a third brother, for the settlement of their affairs and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity-bond was declared to be B.'s (the surety's) debt. B.'s administrator being called on to pay the arrears of the annuity, brought an action for money paid against A.

* 1 & 2 Vic. c. 110, s. 86, 4 Taunt. 460; Id. 854; 2 M. & S. 550.

The Court held the agreement binding, there being a good accord between the parties; and that it came within the rule in Com. Dig. *Accord.* (B. 4.), that an accord, with mutual promises to perform, is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance.

## VIII. STAMP DUTIES ON.

MESTAYER *v.* BIGGS, T. T. 1834. Ex. 1 *C., M., & R.*, 110; S. C. 2 *D. P. C.* 695.

When the consideration is not a pecuniary one, the clause in the Stamp Act, imposing an ad valorem duty, does not apply.

THE condition of a bond, after reciting that M. M., the obligee, had contracted with S. B. and the obligor, for the sale to him, S. B., of a messuage, &c., in consideration, amongst other things, of an annuity of 150*l.*, to be paid to her, M. M., during her life, by S. B., by four quarterly payments in the year; and further reciting, that, on the contract of the purchase of the messuage, it was agreed that, for better securing the payment of the said annuity, the said S. B. should execute that bond for the payment of the said annuity at the times, &c. This bond was stamped with a 1*l.* 15*s.* deed stamp.

The Court held, that the bond was properly stamped; and that the consideration not being pecuniary, it did not require any enrolment under theannuity act.

MASSY *v.* NANNEY, H. T. 1837. C. P. 3 *Bing. N. S.* 478; S. C. 4 *Scott*, 258.

Hence, marriage is not a pecuniary consideration requiring such ad valorem stamp.

MARRIAGE-SETTLEMENT deed, whereby a party, in consideration of the marriage, and a sum of money paid as a marriage portion by the father of the intended wife, covenanted to pay an annuity to trustees to the use of the husband and wife during their joint lives.

In an action on the deed, it was contended, that it required an ad valorem stamp, within the 55 Geo. 3, c. 184, as upon the sale of an annuity.

*Sed per Cur.*—The deed does not require an ad valorem stamp. The case of *Dean* v. *Diamond*, 4 B. & C. 243, is in point. There it was held, that a conveyance by father to son, of a freehold estate, reciting that the father was minded and resolved to give and assure the same to his son, as well in consideration of the natural love and affection which he entertained for his son, as also in consideration of the provision which his son had that day made by his bond, or obligations in writing, of 6500*l.*, in augmentation of the portions of his sisters, did not amount to a sale to the son, and consequently that the conveyance did not require an ad valorem stamp, under 48 Geo. 3, c. 14, sched. Part. I. The transaction cannot be said to be a mere sale. The party was not to put the money in his pocket and carry it off. He was to do much more. He was bound to support his wife in a becoming manner, and in a station suitable to that which she held before.

DOE *v.* REYNOLDS, M. T. 1833. K. B. 2 *N. & M.* 383.

And where the purchaser of an annuity is ad-

UPON a surrender of copyholds to A. for life, and to B., C., and D., in remainder, B., the survivor, upon the remainder falling in possession, was admitted in trust for an annuitant by bond, and

mitted under copy of court roll, the stamp is regulated by the purchase-money.

subject thereto in trust for the purchaser:—Held, that as the stamp was imposed upon the instrument creating the annuity, the surrender merely referring to some instrument created or to be created, the ad valorem stamp on the purchase-money stated was sufficient.

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## IX. REMEDIES ON*.

### (*a*) By action.

WITHERS *v.* BERCHAM, T. T. 1824. K. B. 3 *B. & C.* 254; S. C. 5 *D. & R.* 106.

If the interest in an annuity be several, one of several covenantees may sue alone;

TWO persons had, by different deeds, two annuities granted to them. A third person, for a consideration, covenanted that if they were not paid their annuities by the grantor, he would pay unto them, (naming them both), their executors, or administrators, the said annuities.

The Court held, that the representative of one of the annuitants could sue alone on that covenant, without joining the other in the action; observing, that in looking to the words of the deed it was joint; but, from the whole of the instrument, it is clear that the interest is several. Neither of the covenantees has any interest in the annuity granted to the other. This decision does not militate against other cases upon the subject.

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PETRIE *v.* BURY, T. T. 1824. K. B. 3 *B. & C.* 353; S. C. 5 *D. & R.* 152.

but, where there are several joint covenantees, all who *may* sue *must* join in the action;

A MAN, on his marriage, covenanted with three persons that his executors should pay an annuity to them for the use of his wife:—It was held, that one alone could not sue the executors, though he averred in the declaration that the others did not seal the deed; because, though they did not seal, still they might have sued; and it did not appear that they did not assent to it.

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LANE *v.* DRINKWATER, M. T. 1834. Ex. 1 *C., M., & R.*, 599; S. C. 3 *D. P. C.* 223.

therefore, a joint action must be brought where the covenant is to pay "A. and B., their executors, &c., one annuity" of 30*l.* per annum in moieties.

A. AND B., in consideration of 800*l.* paid to them by C. and D., severally and respectively granted, covenanted, and agreed to and with C. and D., their heirs, &c., to pay to the said C. and D., their executors, &c., one annuity or yearly sum of 30*l.*, in the shares and proportions following; viz. the sum of 15*l.*, being one moiety of the said annuity or yearly sum, unto C., and the sum of 15*l.*, the remaining moiety thereof, to D.; the said moieties to be respectively paid quarterly. The deed contained several provisions for securing the annuity, which were all given to C. and D. jointly, and a joint warrant of attorney to enter up a joint judgment, and a reversion of a close of land was granted to them jointly, and a joint power of attorney was given to them to sell stock. Lastly, the annuity was made redeemable by the payment to both of one entire sum.—The Court held, that the interest in the annuity was joint; therefore the covenant was joint, and that C. could not maintain an action alone.

* The Court will not order a reference to the Master to ascertain the value of on annuity. (*Ex parte* Burnal, 4 Jurist, 923.)

RANDALL *v.* RIGBY, T. T. 1838. Ex. 4 *M. & W.* 130; S. C. 6 *D. P. C.* 650.

When covenant, and not debt, must be brought for arrears.

IN an action of debt, it appeared that lands were enfeoffed to R. H. and the defendant, to the use, intent, and purpose, that the plaintiff, his heirs and assigns for ever, should receive and take out of the lands a yearly rent of 63*l.*, payable half-yearly; and the defendant covenanted with the plaintiff that R. H. and the defendant, their executors, &c., or some or one of them, would pay or cause to be paid to the plaintiff, his heirs and assigns, the said yearly rent, at the terms appointed for payment thereof. On demurrer, on the ground that debt does not lie for the arrears of rent or annuity in fee—

*Per Cur.*—The question here is, not whether the defendant is liable, but whether he is liable in this form of action. If it had appeared that this was a debt of his own, on which he was liable to the plaintiff, debt might be maintainable as well as covenant; but it is an action on a mere collateral covenant, by which the defendant jointly with another undertakes to secure the payment of an annuity which is issuing out of land. Upon this undertaking, an action of covenant is the proper remedy; in which the plaintiff will recover, by way of damages, the amount actually in arrear.

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DOE *d.* BIASS *v.* HORSLEY, T. T. 1834. K. B. 3 *N. & M.* 567; S. C. 1 *Ad. & E.* 766.

An annuitant under a power to enter may bring an ejectment without a previous demand.

IN ejectment, it appeared, that lands were devised in fee, charged with an annuity, and power was given to the annuitant to distrain if the annuity were in arrear for twenty days after the day of payment, being lawfully demanded; power was also given, if it should be in arrear for forty days, to enter and enjoy the lands, and to take the profits until the annuitants should be thereby paid and satisfied all the arrears, with all costs, or until the person entitled to immediate possession should pay all the arrears and costs.

The jury found, that the four years of the annuity, between 1823 and 1828, still remained unpaid at the time of the bringing the ejectment. But the Judge, being of opinion that proof of a demand was also requisite, nonsuited the plaintiff. On motion to set it aside, the Court held, that, upon the annuity being forty days in arrear, the annuitant might bring ejectment without making any demand.

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PITT *v.* WILLIAMS, M. T. 1836. K. B. 4 *N. & M.* 412; S. C. 5 *Ad. & E.* 885.

The declaration, in assigning breaches for non-payment of arrears, must not disclose grounds on which the right to the annuity may be impeached.

ON a writ of error in covenant, the indenture recited, that F. and G. were entitled to a fourth part of a colliery for a term of years; that G. was also entitled, by agreement with A., to a lease of land essential for working the colliery, and held the agreement in trust for himself and F. jointly; that P. had a power of sale upon a moiety of the colliery for the same term, to secure an annuity, which power he was about to exercise; that F. and G. agreed to purchase the moiety, which was to be discharged from the annuity, and to grant a fresh annuity to P., payable out of the profits accruing from the working of the coal, by virtue of the term in the three parts of the colliery. By the same indenture, after such recital, the moiety was assigned and the annuity granted, and F. and G. covenanted, severally, for themselves, their executors, administrators,

and assigns, to pay the annuity, as above, from the profits accruing after payment of all rates, taxes, &c., and of the rents reserved on the term or by the agreement. A right of entry on the premises charged and of mortgage and sale was given to P., on the annuity being in arrear; and F. and G. covenanted, severally, for themselves, their heirs, executors, and administrators, (not naming assigns), to do nothing whereby the annuity might cease, determine, be impeached, or become void and of no effect, or whereby the lease by which the colliery was originally demised, or the agreement, should be forfeited, or the terms thereby created cease. P. sued in covenant on the indenture, assigning for breach, that F. and G. took a lease of the land, to which G. was entitled under the agreement, in their own names and not in trust for P., but for other persons, and forfeited and surrendered the agreement, whereby the annuity was impeached and the plaintiff's right over the land and in the profits which would have accrued ceased.

The Court of Error, on reversing the judgment in King's Bench, said—That the breach shewed that the annuity might be effectually impeached; and therefore the declaration could not be sustained.

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CANE *v.* CHAPMAN, M.T. 1836. K. B. 1 *N. & P.* 104; S. C. 5 *Ad. & E.* 647.

In declaring against commissioners for an annuity payable to parties advancing money for the purposes of a local act, it must be alleged that it was advanced for such purposes.

CASE against the defendant, clerk to the Commissioners for paving and lighting the town of Harwich. The declaration stated, that, after the passing of the local act, the plaintiff advanced to the commissioners, on mortgage, the sum of 1350*l.* for the purchase of an annuity on his own life; and, thereupon, by a grant then made according to the form of the statute, five of the commissioners appointed in pursuance of the said act, at a meeting held pursuant thereto, granted to the plaintiff an annuity of 140*l.* out of the rates granted and to arise by virtue of the said act, payable quarterly, the first payment to be made on the 1st March then next ensuing; that a quarterly payment afterwards became due, and before it became due, the commissioners had received, and then retained in their hands, out of the rates, sufficient funds to satisfy the said quarterly payment. Averment of request to pay, and that thereupon it became the duty of the commissioners to pay the said quarterly payment, or cause the same to be paid, to the plaintiff. Breach —Non-payment thereof. Plea—That it was not the duty of the commissioners to pay, or cause to be paid, the said quarterly payment modo et formâ. Special demurrer to that plea.—On arguing which it was objected to the declaration, that it did not appear that the money was advanced for the purposes of the act.

*Per Cur.*—This might have been fatal on special demurrer, but it is cured on general demurrer.

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RICHARDSON *v.* TOMKIES, T. T. 1832, C. P. 9 *Bing.* 51; S. C. 2 *M. & Scott*, 56.

If grantor plead that there is no memorial, the grantee must set out the memorial, and may

To a cognizance for the arrears of an annuity the plaintiff pleaded, that a memorial of all the deeds, &c., by which the annuity was granted, the names of the witnesses, the consideration, &c., was not enrolled in the Court of Chancery: the defendants replied, that a memorial of all the deeds, &c., the names of the witnesses, the

consideration, &c., was enrolled; and, after setting out the memorial at length, concluded with a prout patet per recordum, and verification thereon:—Held, sufficient on demurrer; alleging, that the conclusion should not have been to the country.

conclude with a verification of the record, and need not conclude to the country.

*See* 4 *T. R.* 585; 2 *H. Bl.* 280; 11 *East*, 188.

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Mestayer *v.* Biggs, E. T. 1834. Ex. 1 *C., M., & R.*, 110; S. C. 2 *D. P. C.* 695—S. P. Massy *v.* Nanney, H. T. 1837. C. P. 4 *Scott*, 258; S. C. 3 *Bing. N. S.* 478.

To debt on bond, breaches assigned for non-payment of arrears of annuity, the defendant pleaded non est factum. It was objected, that the bond had not been enrolled; but the Court held, that the defence was not available under the plea, the rule being, that a statutory objection in avoidance of the action must be pleaded.

Non-enrolment of an annuity-bond cannot be shewn under the plea of non est factum.

*See* 2 *N. & M.* 573.

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Few *v.* Backhouse, M. T. 1838. K. B. 1 *P. & D.* 34.

To an action of covenant on an annuity-deed, the defendant, after setting out the deed on oyer, pleaded—1st., that the plaintiff heretofore, to wit, in Michaelmas Term, 1832, in the King's Bench, impleaded the defendant in an action of debt of 2000*l.*, for the very same identical causes of action as are in the declaration mentioned; and, 2ndly, that the plaintiff recovered a judgment against the defendant for 2000*l.* and costs, whereof the defendant was convicted, prout patet per recordum; which judgment is still in force and unsatisfied. Averment—That the causes of action in the said judgment are the same as those in the declaration. On demurrer—

A plea that plaintiff recovered a judgment, and that the present action is brought for identically the same causes, is bad on general demurrer.

The Court held the plea bad.

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Hickes *v.* Cracknell, M. T. 1837. Ex. 3 *M. & W.* 72.

Debt upon an annuity-bond. Plea—That no memorial of the said writing, containing the names of all the witnesses thereto, and the date of the said writing obligatory, and the names of all the parties thereto, or of the person for whose life the said annuity was granted, and of the person by whom the said annuity was to be beneficially received, or of the pecuniary consideration for granting the said annuity, or how such consideration was paid, or the annual sum to be paid thereby, was enrolled in Chancery according to act of Parliament. Replication—That a memorial was duly enrolled, (setting it out), and averring that it contained all the above requisites stated in the plea. Rejoinder—That the said memorial in the replication contains divers false statements and representations, relating to certain matters of fact material to the validity of the said annuity; especially in representing that the consideration for the said annuity was paid in notes of the Bank of England; whereas the said consideration, or any part, was never paid in notes or otherwise. And so, the defendant again saith, that there never was any such memorial as the act requires enrolled in Chancery:—Held, upon special demurrer, that the rejoinder was not inconsistent with or a departure from the plea.

After a plea, alleging that no memorial of the grant was enrolled, on which the plaintiff has taken issue, it is no departure to rejoin, that the memorial contained false statements.

SHAW *v.* MARQUIS OF WORCESTER, H. T. 1830. C. P. 4 *M. & P.* 21; S. C. 6 *Bing.* 385.

In general, where a warrant of attorney is given, execution may issue, without assigning breaches under 8 & 9 Will. 3.

IN this case, a judgment had been entered up on a warrant of attorney in an action of debt upon a mutuatus for 3400*l.*; and it appeared on the face of the warrant of attorney, that, on the treaty for the purchase of an annuity, it was agreed that such warrant of attorney should be given, and that judgment should be forthwith entered up under it, for better securing the payment of the annuity. On application, by the defendant, to set aside the writ of execution which had been issued for the amount of the arrears of the annuity, on the ground that the plaintiff ought to have suggested breaches of the covenant for payment of the said annuity, which covenant appeared in the recital contained in the warrant of attorney, under the statute 8 & 9 Will. 3, c. 11, s. 8,—

*Per Cur.*—That statute enacts, "That, in all actions upon any bond or bonds on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession or nil dicit, the plaintiff, upon the bill, may suggest as many breaches as he shall think fit." The question is, whether a judgment signed under this warrant of attorney falls within the letter of the act or the mischief intended to be prevented thereby. As the law stood at the time this act was passed, if there was judgment in a Court of Law for a penal sum, either upon a demurrer, or upon a cognovit actionem, or by default, the defendant was exposed to danger of an execution for the whole penalty, and had no mode of preventing such an inconvenience but by filing a bill in equity; and the statute was passed to prevent such a mischief, by compelling the plaintiff to shew, upon the record in the Court of Common Law, the amount of the debt or damages really due, and of enabling the defendant to dispute such amount before a jury; thus making an appeal to a Court of Equity altogether unnecessary. But a warrant of attorney to enter up a judgment as a security for a debt or demand was known, in practice, to the Courts of Law long before the passing of the statute of William. It was a proceeding subject to their cognizance and interference from the earliest times, and has been regulated by various rules of Court, as the protection of the defendant or the purposes of justice seemed to demand. Such an instrument, therefore, does not appear to be within the mischief of the act.

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HASLAM *v.* DIGGLES, T. T. 1824. N. P. 1 *C. & P.* 398.

After a lapse of 20 years, the payment of the consideration-money for an annuity will be presumed.

DEBT on annuity-bond, reciting the payment of the consideration, and it was shewn that the annuity had been paid for several years. On its being objected, that the actual payment of the consideration should be proved, there being no receipt indorsed, and the subscribing witness having no recollection on the subject, *Best*, C. J., ruled, that, after such a lapse of time, the jury might presume the payment of the consideration.

*See* 8 *T. R.* 328; 2 *East*, 85.

(*b*) By distress.

James *v.* Salter, H. T. 1837. C. P. 4 *Scott*, 168; S. C. 3 *Bing. N. S.* 544; S. C. 5 *D. P. C.* 496.

An annuitant under a will must, since the 3 & 4 Will. 4, c. 27, sue or distrain within 20 years.

A testator devised an annuity or rent of 30*l.* to defendant, with power of entry and distress if the payment remained behind a certain time; payable, in the first instance, out of certain leasehold property then in his possession; and, if the leasehold proved inadequate, his freehold premises were rendered liable to the payment, with the same powers, &c. The defendant distrained, upon the freehold; and, in replevin, the Court held, that a distress for the arrears of an annuity created by will must be made within twenty years next after the right of the party distraining first accrued, according to the 2nd section of the 3 & 4 Will. 4, c. 27, that section not being qualified or controlled by the 3rd section; and the causes specified in the latter section being put merely as instances of doubt and difficulty, not excluding cases not mentioned in such enumeration from the operation of the 2nd section.

*See Rodham* v. *Berry, Shelford's Real Property Statutes, p.* 90, *and* 3 T. R. 181.

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(*c*) In cases of insolvency and bankruptcy.

Bell *v.* Bilton, E. T. 1828. C. P. 4 *Bing.* 615; S. C. 1 *M. & P.* 574.

Where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners before a surety can be sued,

This was an action of covenant against the surety of the grantor of an annuity, the grantor having become bankrupt; the annuity, secured by the deed on which the action was brought, was 70*l.* per annum. The plaintiff sought to recover 35*l.*, being for two quarters of the annuity, which became due on the 29th October, 1826. The annuity-deed was dated the 29th January, 1822. The commission of bankrupt under which the grantor of the annuity was declared a bankrupt issued in 1823. The bankrupt passed his last examination on the 6th September, 1823; since which time no meeting has been held under the commission. It appeared no dividend had been paid. The value of the annuity, at the time of the issuing of the commission, had not been ascertained by the commissioners or proved by the plaintiffs under the commission. It was objected, at the trial, that although, at the time the annuity was granted, there was no law that compelled the grantor to ascertain the value of the annuity at the date of the commission, and to prove for such value before he brought any action against the surety of the grantor; yet, as the arrears sought to be recovered became due since the 6 Geo. 4, no action could be brought to recover them until after a valuation of the annuity, and proof of the ascertained value under the commission, and delay on the part of the surety in paying the sum so proved.

The Court held, that the plaintiffs not having pursued the course pointed out by the statute 6 Geo. 4, this action could not be maintained.

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Hone *v.* Morgan, T. T. 1829. K. B. 4 *M. & R.* 559.

or execution issued against him on a war-

Motion to set aside judgment on a warrant of attorney issued against the grantor of an annuity and his surety, on the ground that the grantor having become bankrupt and a commission having is-

rant of attorney.

sued against him, the grantee not having proved under the said commission the value of the annuity, as directed by 6 Geo. 4, c. 16, s. 55, which enacts, that no execution can issue against the surety until the value has been ascertained by the Commissioners under s. 54.

That not having been done in this case, the Court made the rule absolute.

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THOMPSON *v.* THOMPSON, T. T. 1835. C. P. 2 *Scott*, 266.

There can be no proof against the surety, for arrears after the bankruptcy; hence, the surety continues liable.

IN an action on an annuity-deed the jury found a special verdict, that, before the commencement of this suit, to wit, on the 8th December, 1831, the defendant became a bankrupt; and that, thereupon, a certain commission of bankruptcy, dated at Westminster, 8th December, 1831, was, after the making of the indenture in the declaration mentioned, duly awarded and issued against the defendant; that, by virtue of such commission, the defendant was duly found and adjudged to be a bankrupt; and that the defendant, afterwards, and before the commencement of the suit on the 3rd April, 1833, duly obtained his certificate; that 140*l.*, part of the said sum of 280*l.* of the said annuity, yearly rent-charge, or annual sum, became and was due and owing, and in arrear to the plaintiff, since the said 3rd April, 1833.

It was contended, that the sums claimed in this action are debts provable under the 26th section, which was expressly introduced for the purpose of removing the hardship of making a bankrupt liable to subsequent debts, although he had been stripped of all his property, and thus rendered unable to pay them: but the Court were of opinion, that the subsequent arrears were not provable under the commission; consequently, his certificate is no bar to an action by the grantee to recover such arrears.

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COLLINS *v.* LIGHTFOOT, T. T. 1826. K. B. 5 *B. & C.* 581; S. C. 8 *D. & R.* 339—S. P. JERVIS *v.* JONES, H. T. 1836. K. B. 4 *D. P. C.* 610.

In case of discharge under the Insolvent Act, the insolvent cannot be sued for subsequent arrears*.

UPON motion to discharge the defendant out of custody, upon an affidavit made by the defendant, stating, that in 1810 he joined a surety in a grant of annuity by bond, by one Edgeworth Moore, to the plaintiff; that in 1820 he was discharged under the Insolvent Act as to all the debts contained in his schedule then filed; and that, in his schedule, he inserted not only the principal consideration money, but also the arrears, making together, 1167*l.*; that he had since been arrested in this action for arrears which accrued due since his discharge.

The Court thought that there was no distinction between principal and surety. They were both bound by the bond, and the plaintiff was therefore clearly an annuity creditor of the defendant, at the time of his discharge.

* See 1 & 2 Vic. c. 110, s. 80.

## X. WHEN DEEMED SATISFIED*.

COTTLE *v.* WARRINGTON, T. T. 1833. K. B. 5 *B. & Ad.* 447.

After obtaining by a sequestration the full amount of the judgment, the grantee is not entitled to retain possession in opposition to other judgment creditors, for subsequently accrued arrears.

THE judgment was for 1800*l.* The warrant of attorney provided, that, on the death of the defendant and full payment of arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that at that time the former creditor had, by sequestrations, levied more than 1800*l.* for arrears of his annuity, and there were arrears still due. The Court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor, and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.* levied before the signing of his judgment.

## XI. APPORTIONMENT OF†.

* The mere non-payment of an annuity for seventeen years, and that the grantee had borrowed money of the grantor, and paid interest, without setting off the annuity, is not evidence of the annuity being satisfied, unless the jury presume that at some certain time during the seventeen years the grantee actually executed a release of the annuity. (*Bigg* v. *Roberts*, M. T. 1827, N. P., 3 C. & P. 43).

† The stat. 4 & 5 Will. 4, c. 22, after reciting the 11 Geo. 2, c. 19, s. 2, enacts, "That all rent-charges, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable, or coming due at fixed periods, under any instrument that shall be executed after the passing of this act, (or being a will or testamentary instrument), that shall come into operation after the passing of this act, shall be apportioned, so and in such manner, that, on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination, by any other means whatsoever, of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges, and such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her heirs, executors, administrators, and assigns, shall have such and the same remedies at law and in equity, for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments, if entitled thereto; but, so that persons liable to pay rents reserved by any lease, or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this act had not passed, would have been entitled to such entire rents, and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law or in equity."

Mr. Hayes, in his valuable work on Conveyancing, introduces the following

**Answers in Chancery.** See tits. *Evidence—Perjury.*

remarks:—"The most important question which arises upon the statute is, whether the second section extends to the case of an annuity or other periodical payment which determines on the death of the person interested. Thus, A. grants an annuity to B. for the life of B., payable half-yearly at Midsummer and Christmas; B. dies on the 23rd of December—are the representatives of B. entitled to recover from A. a proportionate part of the annuity for the time elapsed from the preceding Midsummer? The decision of this question must be left to a Court of Judicature, but a short analysis of the act may assist in forming an opinion upon the point. The act proposes to itself two objects: First, to give an extended interpretation to the act of 11 Geo. 2, which awards a recompense for the space elapsed from the last rent-day until the death of the tenant for life to his representatives, as against his lessee; (who, before that statute passed, enjoyed the land absolutely rent-free for the interval, so that the statute not merely modified the right to receive, but created the liability to pay): Secondly, to apportion 'rents, annuities, and other payments not apportionable, unless express provision be made for the purpose.' These objects are sought to be severally accomplished by the first and second sections. Now it is clear that, in the case proposed, it would not be liable, by force of the grant, to make any payment to any person on account of the annuity for the time elapsed since Midsummer. And that such cases, therefore, are rather analogous (1 Swanst. 349, n.) to those of leases by lifehold tenants, which form the subject of the first section, where the legislature has made an express and particular application of the principle to rent reserved upon demises by lifehold tenants. The second section provides for the apportionment of periodical payments. But the case which we are now considering is not a case of apportionment in that acceptation of the term, which supposes an existing fund to be doled out among several claimants, according to their respective rights; for, in the case proposed, the annuity ceased on the death of B., and nothing remained to be apportioned. From the wording of the second section, which speaks of the apportionment of the annuity, &c., on the death of 'any person interested in such annuity,' &c., or on the determination, by any other means whatsoever, 'of the interest of any such person,' and provides for the recovery of the apportioned part, 'when the entire portion shall become payable,' and not before;' it may be inferred that the framer contemplated, throughout, a determinable interest in a continuing subject; and, in order to include cases of the class to which that under discussion belongs, some freedom of interpretation must be used. It has been observed, 'that to give the annuitant a proportion, would seem to be an unauthorized interference with the contract of the parties; for why should one party be bound to pay, and the other entitled to receive, more than such contract specifies?' (9 Jarm. Conv. 578, n). But it must be recollected, that the legislature does not interfere with existing contracts, the provision of the statute being applicable only to future leases, &c.; and that such prospective alteration is made in the instance of the lessee of a tenant for life; and it should seem that the claim of the representatives of the tenant for life, and the claim of the representatives of the life annuitant, stand upon the same grounds of reason and justice, which require that the accident of the dropping of the life, before the entire portion has accrued due, should not, in either case, absolve the party who, in contracts made after the passing of this act, must be presumed to have received a consideration extending to the whole term of the life from the payment of any part. Some arguments favourable to an extension of the 2nd section to the case of the life annuity may be drawn from the 3rd and concluding section, which enacts, that the provisions of the act shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description. In practice, the prudent course, in all cases, is to exclude questions of this nature by providing expressly for the payment or the non-payment, as the intention may require, of a proportionate part."

# Apothecary.

And see tits. *Physician—Poor-Rate—Surgeon.*

I. ACTIONS BY, p. 239.
II. ACTIONS AGAINST, p. 242.
III. CONTRACTS TO SERVE CONTRARY TO THE APOTHECARIES' ACT, VOID, p. 244.

## I. ACTIONS BY*.

ALLISON *v.* HAYDON, E. T. 1828. C. P. 1 *M. & P.* 588; S. C. 4 *Bing.* 619.

To enable a member of the College of Surgeons to sue for medicines, he must have a certificate from the Apothecaries' Company.

ASSUMPSIT for work and labour as a surgeon and apothecary, and for medicines furnished for the cure of a fever. It appeared that the plaintiff was a member of the Royal College of Surgeons; but he was not certificated by the Apothecaries' Company, which, it was contended on the part of the defendant, he must be, to entitle him to recover for medicines and attendances. *Burroughs*, J., therefore directed a nonsuit. On motion to set the nonsuit aside—

*Per Cur.*—The apothecary is the proper person to administer medicine, and the case of fever is his province. The 21st section 55 Geo. 3, c. 194, enacts, that none shall practise as apothecaries unless licensed by the Apothecaries' Company. This plaintiff has acted as an apothecary, by administering medicine as such in a case of fever. The 29th section affords him no relief; it merely preserves the privileges of the Royal College of Surgeons, but it does not extend them. As, therefore, the plaintiff has assumed a character in which he was not authorized to act, and has done this in contravention of the statute, he was properly nonsuited.

SHEARWOOD *v.* HAY, T. T. 1836. K. B. 5 *Ad. & E.* 383; S. C. 6 *N. & M.* 831—S. P. MORGAN *v.* RUDDOCK, M. T. 1835. K. B. 4 *D. P. C.* 311—S. P. WAGSTAFFE *v.* SHARPE, E. T. 1838. Ex. 3 *M. & W.* 521; S. C. 6 *D. P. C.* 566, *nom.* SHARPE *v.* WAGSTAFF.

Under the new rules the plain-

THE defendant pleaded non-assumpsit to an action for medicines, attendances, and journeys, supplied and performed by the plaintiff

* By stat. 55 Geo. 3, c. 194, s. 21, (explained and amended by 6 Geo. 4, c. 133), no apothecary shall be allowed to recover any charges claimed by him in any Court of Law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 1st August 1815; (see *Apothecaries' Company* v. *Roby*, 5 B. & A. 949; and it seems that, by 6 Geo. 4, c. 133, s. 5, he must prove himself to have been in practice on the 1st day of August, 1815); or that he has obtained a certificate to practise as such from the Apothecaries' Company. The statute does not relate to chemists, or druggists, or to the College of Surgeons. (Sect. 28, 29).

Under the 6th section of this act, which provides, "That no person shall be admitted to the examination therein specified, unless he shall have served an apprenticeship," a certificate, duly issued by the Court of Examiners, is conclusive evidence of that fact; and, therefore, in an action to recover the amount of a bill as an apothecary, the plaintiff need not also prove an apprenticeship served. (*Sherwin* v. *Smith*, 1 Bing. 204; S. C. 8 Moore, 30). Where not qualified, he cannot recover even for the phials in which the medicine was contained. (*Steed* v. *Henley*, M. T. 1824, N. P., 1 C. & P. 574).

tiff is bound, under non assumpsit, to prove that he is an authorized practitioner;

as a surgeon and an apothecary. On the trial before the under sheriff the plaintiff was nonsuited, on the ground that he did not prove himself to be an apothecary within the terms of the 55 Geo. 3, c. 194. On motion to set the nonsuit aside—

*Per Cur.*—The 55 Geo. 3, on grounds of public policy, makes it imperative on a person suing as an apothecary to shew that he legally filled that character. It would be unjust upon a defendant to call upon him to plead and prove a fact which he may have no means of ascertaining. Where an attorney's bill has not been duly delivered, the party sued for its payment necessarily knows the fact to be relied on in his defence; and the statutes applicable to the attornies and apothecaries, respectively, are very differently worded. The 55 Geo. 3, makes the proof of the plaintiff's qualification a condition precedent to his right to recover. The new rules do not apply to this case.

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SHEARWOOD *v.* HAY and WILLS *v.* LANGRIDGE, T. T. 1836. K. B. 5 *Ad. & E.* 383; S. C. 6 *N. & M.* 831.

and a plea of tender as to part, and non assumpsit to residue, does not admit plaintiff's right to the character he assumes.

To an action for work and labour as a surgeon, with a count for money had and received, and on an account stated, the defendant pleaded as to the several counts except as to 5*s.* 9*d.*, parcel of the money in the first count mentioned, nunquam debuit; secondly, a set-off; and, thirdly, as to 5*s.* 9*d.*, a tender.

It was contended, that the tender of 5*s.* 9*d.*, in the first count, operated as an admission by the defendant of the character in which the plaintiff sued; which is a fact which distinguishes this from the case of *Shearwood* v. *Hay*, supra, and makes it stronger in favour of the plaintiff.

*Sed per Cur.*—The plea of tender admits only a contract to the amount of the sum tendered. (*Reid* v. *Dickons*, 5 B. & Ad. 499). In that case, *Parke*, J., says, "Beyond that sum every defence is open." So here, every other defence was open with respect to every other sum, except that which is admitted on the record to be due. Consequently, the plaintiff must prove that he was qualified to act as an apothecary.

*See observations in Waystaffe* v. *Sharp*, 3 *M. & W.* 521.

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WALMISLEY *v.* ABBOT, 1824. N. P. 1 *C. & P.* 309, *confirmed;* 3 *B. & C.* 218; S. C. 5 *D. & R.* 62.

Producing the certificate of examination and proving the signature of one of the examiners to it suffices*.

To shew that the plaintiff had passed his examination at Apothecaries' Hall, under the stat. 55 Geo. 3, c. 194, a witness produced the certificate of the plaintiff's examination at that place, and proved that the signature was the handwriting of an examiner, and that he acted as an examiner at Apothecaries' Hall, and that the certificate produced was the usual certificate given to persons who had passed their examinations.

* A certificate in general terms will enable an apothecary to recover for business done, in London, though the lower rate of duty has only been paid on it. *Chadwick* v. *Bunning*, M. T. 1825, N. P., 2 C. & P. 106; S. C. 1 R. & M., n. 306). Administering medicine while acting as an assistant, is not a practising as an apothecary on or before the 1st August, 1815, within the 55 Geo. 3, c. 194; (*Brown* v. *Robinson*, E. T. 1824, N. P., 1 C. & P. 264); and the practising as a surgeon or accoucheur is not practising within the exception; but it is for the jury to determine whether the party is bonâ fide practising and seeking his living as an apothecary, although it might be his whole means of living by such practice. (*Woodward* v. *Ball*, 1834, N. P., 6 C. & P. 577).

*Garrow*, B., admitted this to be sufficient. A doubt was suggested, whether it was necessary to prove the seal to the certificate; but his Lordship deemed it indispensable, and the beadle to the company was called.

it must, however, be proved that the seal affixed is the seal of the Apothecaries' Company.

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BLOGG *v.* PINKERS, T. T. 1824. N. P. 1 *R. & M.* 125.

ACTION upon promissory note by *Payee* v. *Maker*. The plaintiff was an apothecary, and the note given for business done. The Court held, that the plaintiff was bound to shew that he had obtained his certificate within 55 Geo. 3, c. 194, s. 21, although the consideration stated on the face of the note did not imply that it was for medical services.

And the certificate must be proved even where he sues upon a promissory note for business done, though the consideration does not appear upon the face of it.

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THOMPSON *v.* LEWIS, M. T. 1828. N. P. 3 *C. & P.* 483; S. C. 1 *M. & M.* 255.

ACTION for an apothecary's bill. It was attempted to be shewn that the plaintiff was in practice on the 1st August, 1815. Lord *Tenterden* said—To support this action it must be proved that the plaintiff practised as an apothecary on or before the 1st day of August, 1815. It is contended, on the part of the defendant, that the plaintiff was not an apothecary, but merely a person who went about to cure certain local complaints, on the terms of no cure no pay. Now, if that be so, I think that that is not a sufficient practising as an apothecary to satisfy this act. The merely going about curing these particular and local complaints not being, in my judgment, a practising as an apothecary. The duty of an apothecary is to prepare the medicine directed by the prescriptions of physians.

The plaintiff must be proved to have compounded medicines and practised the general duties of an apothecary before the 1st August 1815.

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HANDEY *v.* HENSON, M. T. 1830. N. P. 4 *C. & P.* 110—TOWNE *v.* GRESLEY, H. T. 1829. N. P. 3 *C. & P.* 581—*Per Best, C. J., contra.*

THE plaintiff's bill, as an apothecary, contained charges for medicine, and several items of 2*s.* 6*d.* each for attendance. The charges were found to be fair and reasonable. Lord *Tenterden* told the jury, that, if they thought the charges not too much, they would give a verdict for the sum claimed, including the attendance.

*See Allison* v. *Haydon*, 3 *C. & P.* 246; 4 *Bing.* 619; 1 *M. & P.* 588.

An apothecary may recover for attendance as well as for medicine.

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MORGAN *v.* HALLEN, T. T. 1838. K. B. 3 *N. & P.* 498; S. C. 8 *A. & E.* 489.

IN an action by a surgeon and apothecary for medicines against an executor, the plaintiff proved that he had attended the deceased for many years, from 1820 to 1835, as an apothecary, having visited her very frequently, and having supplied medicines to her. He had, in 1828, sent in a bill amounting to 96*l.* 12*s.* 6*d.*, in which he charged for medicines only, adding an item for extraordinary attendances, but not affixing any sum to it. The deceased paid that

The right to charge for such attendance arises out of an implied contract to that effect, and its existence or non-existence must be found by the jury*.

* An apothecary who is called to attend a child who resides at a distance from its father, may sue him for his attendance, &c. But the master of a servant is not liable for attendance on his servant, unless with the knowledge or sanction of the master. (*Cooper* v. *Phillips*, E. T. 1831, N. P., 4 C. & P. 581. See *Wennall* v. *Adney*, 3 B. & P. 247).

bill, and gave the sum of 20*l.* for the attendances. After her death, in 1835, he sent in his bill to the defendants, in which he claimed 104*l.* 18*s.* 6*d.* for medicines supplied, and 110*l.* 10*s.* for extraordinary attendances and advice. This bill the defendants refused to pay.

*Littledale*, J., who tried the cause, said, that if there was any question of law, it might be considered afterwards; but left it to the jury to say, whether both charges made by the plaintiff were reasonable under the circumstances of the case. The jury found in the affirmative. On motion to set the verdict aside—

*Per Cur.*—We understand the Judge to have said, "If this be a question of law I will reserve the consideration of it; but I consider that there are these questions of fact: first, whether there was any contract that the plaintiff should not charge for his attendances; and, secondly, whether, supposing that there was no such contract, the bill sent in by the plaintiff was a reasonable one. The jury must be taken to have found that there was no such contract; and, though they appear to have been very liberal, we do not see how the other point could be anything else than a question of fact, which they had to decide. We cannot say, in point of law, that the apothecary cannot charge for his attendances.

## II. ACTIONS AGAINST.

APOTHECARIES' COMPANY *v.* COLLINS, E. T. 1833. K. B. 1 *N. & M.* 401; S. C. 4 *B. & Ad.* 604.

The possession of a Scotch diploma does not exempt a party practising as an apothecary from penalties, under 55 Geo. 3, c. 194.

ACTION for penalties. Defence, that the defendant was a physician, with a diploma from the University of Aberdeen. It was argued, that, since the union of Scotland with England, a Scotch diploma had the same effect as one from the College of Physicians; and that the act 55 Geo. 3, c. 194, expressly exempts members of that body from its provisions. (See 1 N. R. 203).

*Per Cur.*—The words of the act are too plain to be got over. The 14th sect. excludes all persons who do not obtain a certificate from the Court of Examiners of the Apothecaries' Company. That is a general prohibition of all that do not fall within that class. But then there is, in the 29th sect., an exemption in favour of the English Universities, and the Colleges of Physicians and Surgeons, and of those who were already in practice. Their rights are reserved. There is no exemption whatever in favour of any of the Irish or Scotch Universities.

THE APOTHECARIES' COMPANY *v.* BENTLEY, M. T. 1824. N. P. 1 *R. & M.* 159; S. C. 1 *C. & P.* 538.

The defendant in an action for penalties must shew that he *has* a certificate, the Company need not prove that he has not*.

ACTION for penalties, on 55 Geo. 3, c. 144, s. 20; no evidence was offered by the plaintiffs that the defendant had not obtained a certificate. It was argued, that the onus probandi lies upon the plaintiffs; but Lord *Tenterden* held, that, as the offence was charged in the negative, the proof devolved upon the defendant.

*See* 1 *T. R.* 144; 1 *B. & P.* 468; 5 *M. & S.* 206; 3 *B & A.* 103.

* Qu. Whether a party incurs a fresh penalty for each patient he attends. See 1 C. & P. 538.

THE APOTHECARIES' COMPANY *v.* ALLEN, E. T. 1833. K. B. 1 *N. & M.* 413; S. C. 4 *B. & Ad.* 625.

It is an offence within the act, for an unqualified person to dispense medicine, which he himself advises, professionally, to be administered.

DEBT for penalties. It was argued, that, to render a party liable to penalties under the act 55 Geo. 3, c. 194, he must have dispensed such medicines as may be directed by a physician, and not such medicines as he himself may recommend and prepare; but, by the Court, 'dispensing' must properly mean a dispensing in pursuance of a man's own advice as well as of the advice of a physician.

*See* 3 *B. & Ald.* 40.

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APOTHECARIES' COMPANY *v.* GREENWOOD, T. T. 1831. K. B. 2 *B. & Ad.* 708.

And the fact of his being an apprentice, if he resides away from his master, makes no difference.

THE defendant bound himself to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which defendant resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients. In an action against the defendant for penalties, under 55 Geo. 3, c. 194—

*Per Cur.*—If a case like the present be not within the act, a door will be opened whereby the objects of the act may be evaded; and there may be a practising at several towns under one certificate, and at some of them by persons under the name and colour of apprenticeship, with little or no benefit to the patients from the skill or knowledge of the person who has obtained the certificate. We think the only safe rule is to confine the practice of apprentices to the residence of their master.

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GLADWELL *v.* STEGGALL, T. T. 1839. C. P. 5 *Bing. N. S.* 733.

A surgeon who attends a patient may be sued for negligence*, though he may have been retained by some other person.

IN an action on the case, by an infant of the age of ten years, against the defendant, for his alleged want of care and skill in the treatment of the plaintiff. The defendant, in his plea, traversed the employment by the plaintiff, and of the acceptance thereof and entering thereupon by him, in manner and form, &c.; upon which issues were joined. At the trial, it appeared that the defendant was sent for by the mother of the plaintiff; and it was during his attendance the negligence and want of skill complained of were exhibited. The defendant had, it seemed, been in the habit of attending the family. His bill on this occasion was made out and presented to the father. It also contained demands for attendance upon some of the other children. Upon the trial it was objected, that there was no proof of the defendant having been called in and employed by the plaintiff.

*Per Cur.*—The averment of the defendant being employed by the plaintiff is immaterial, inasmuch as the question really at issue is as to the breach of duty, not as to the party by whom the defendant was employed, and the plaintiff is the only person who can maintain the action. If the averment as to the employment of the defendant were material, the declaration might be amended, and such averment be struck out.

* In such an action it is a question for the jury to say whether the apothecary has used a reasonable and competent degree of skill in his treatment of the patient. (*Lanphier* v. *Phipos*, H. T. 1838, N. P., 8 C. & P. 475).

### III. CONTRACTS TO SERVE CONTRARY TO THE APOTHECARIES' ACT VOID.

PROLE *v.* WIGGINS, M. T. 1836. C. P. 3 *Scott*, 601.

An indenture really binding an apprentice for two years, though expressed to be for five years, is void.

IN an action of debt on a money bond, which had been given to the intestate for receiving the defendant's son as an apprentice, and teaching him the art of an apothecary, the defendant pleaded non est factum; and that, by a corrupt and fraudulent agreement between the parties, the indenture of apprenticeship, in consideration of which the bond was given, was antedated, for the purpose of making an apprenticeship of two years seem to be one of five years, and thereby evading the Apothecaries' Act, 55 Geo. 3, c. 194, s. 15, which requires an apprenticeship of five years. Upon verdict for the plaintiff on the first plea, and for the defendant on the plea setting out the fraudulent agreement—

The Court held the bond void, and the second plea an answer to the action, and refused to enter judgment for the plaintiff non obstante veredicto.

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## Appearance *.

See also tits. *Certiorari—Extent—Information—Replevin—Scire Facias.*

I. ON WRIT OF SUMMONS, p. 245.
1st.—BY DEFENDANT.
(*a*) WHEN, AND WITHIN WHAT TIME, p. 245.
(*b*) MODE OF, p. 246.
1. *In Person or by Attorney*, p. 246.
2. *By one of several Defendants*, p. 247.
3. *Must correspond with Process*, p. 247.
2nd.—BY PLAINTIFF.
(*a*) WHEN, AND WITHIN WHAT TIME, p. 247.
(*b*) MODE OF, p. 250.
II. ON A WRIT OF CAPIAS, p. 251.
III. ON A WRIT OF DISTRINGAS. See tit. *Distringas, Writ of.*
IV. ON OUTLAWRY. See tit. *Outlawry.*
V. ATTORNEY'S UNDERTAKING TO APPEAR, p. 251.
VI. FEES PAYABLE ON, p. 251.
VII. STRIKING OUT, WHEN IMPROPERLY ENTERED, p. 251.
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* The appearance by a party to process sued out against him is an admission that he has received the writ, and intends to resist the proceedings. Antecedent

## I. ON WRIT OF SUMMONS.

### 1st,—By Defendant.

#### (*a*) When and within what time.*

Brian *v.* Stretton, M. T. 1832. Ex. 1 *C. & M.* 74; S. C. 3 *Tyrw.* 163; S. C. 1 *D. P. C.* 642.

There is no default as to appearing on the part of the defendant until the lapse of eight days from the day the summons is served, and a copy left of the process.

On the 21st November, a copy of a writ of summons was left at the defendant's dwelling-house, after the requisite number of attempts to serve it personally, without success, had been made. On the 26th a distringas was moved for.

*Bayley*, B.—The defendant is to have eight days to enter an appearance after the service of the writ of summons, which period of time, in cases when he cannot be personally served, is to run from the day on which the person last called at the defendant's dwelling-house and left a copy of the process.

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Brown *v.* M'Cullock, E. T. 1832. C. P. 1 *M. & S.* 679.

The appearance must be entered at the proper office.

A writ issued against A., B., and C., into the county of D.; A. and B. were served in D., and C. in the county of E. The appearance for C. having been entered in the county of E., the plaintiff, treating the plea pleaded as a nullity, signed judgment, there being no proper appearance for the third defendant.

*Per Cur.*—The original writ issued into D. where two of the defendants were served; there was afterwards an alias issued into E., in order to serve the other defendant, who was resident there. The

to the Uniformity of Process Act, (2 Will. 4, c. 39, s. 9), there were several modes of appearing to process, not bailable, which were effected and regulated by the nature of the writ sued out; and, in the Queen's Bench, the act of appearing was called "putting in and filing common bail;" but, by the statute alluded to, these distinctions are now abolished, and one simple and uniform mode is adopted.

* The form of writ of summons prescribed in schedule of 2 Will. 4, c. 39, No. 1, commands the defendant, "that, within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered," &c.; and the 16th sect. enacts, that all proceedings mentioned in any writ, notice, or warning, issued under that act, shall and may be taken in default of defendant's appearance, or putting in special bail, as the case may be. The day of the service, however late in the evening, is included in calculating the eight days. Although the rule, Hil. T. 1832, Rule 8, that in general the prescribed number of days shall be reckoned exclusively of the first day, and inclusively of the last, unless the latter fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving. Yet the eight days' time for entering on appearance are to be reckoned *inclusively* of the first and last day, unless in the excepted cases.

Thus, if an appearance to process served on Wednesday, the first be not entered on or before the 8th (i. e.) Wednesday se'nnight, the plaintiff may enter an appearance on the Thursday, or, if the service were not personal, apply for a distringas, unless the last day was a Sunday, then Monday would be the day for appearing. It is said, that if the defendant enter the appearance within the eight days, the plaintiff is not obliged to wait until the expiration of that time to declare against him, but he may declare immediately. (*Morris* v. *Smith*, 1 *Gale*, 187).

By appearing, the defendant waives all irregularity in the process. (*Humble* v. *Bland*, 6 T. R. 255; 1 Chit. Rep. 129, n.).

The 9 & 10 Will. 3, c. 25. s. 33, imposing a penalty of 5*l.* for not entering an appearance, is no longer enforce. (*Thomas* v. *Nokes*, T. T. 1837, B. C., 5 D. P. C. 650).

defendant C., who was served in E., must have seen by the recital of the alias, that the original had issued into D. The practice clearly is, that the appearance must be entered in the county into which the original writ is directed.

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(*b*) Mode of.

1. *In Person or by Attorney**.

Attorney-General *v.* Carpenter, H. T. 1831. Ex. 1 *C. & J.* 289; S. C. 1 *Tyrw.* 280—S. P. Attorney-General *v.* Birch, M. T. 1833. Ex. 2 *D. P. C.* 255.

Defendants, when sued by the Attorney-General, are entitled to appear without the intervention of a clerk in Court or payment of fees.

The defendant appeared in person in Court, to a subpœna at the suit of the Attorney-General. It was objected, by the clerk in Court, that the defendant could not call upon him to enter an appearance for him without payment of his fees.

The Court ordered the appearance to be recorded without the intervention of a clerk in Court or fees.

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Watson *v.* Dow, E. T. 1837. Ex. 5 *D. P. C.* 584.

It cannot be entered nunc pro tunc†.

Judgment had been signed on a cognovit. On motion to set it aside, it appeared that an appearance was not entered until the third day after judgment signed. It was submitted that the defendant was estopped from objecting to the irregularity, an appearance having been entered nunc pro tunc. *Davis* v. *Hughes*, 7 T. R. 206, was relied on.

*Sed per Parke*, B.—At the time that case was decided there was

* The 2nd sect. of 2 Will. 4, c. 39, enacts, "That the mode of appearance to every writ of summons issued under the authority of that act, shall be by delivering a memorandum in writing, according to the form contained in the schedule; such memorandum to be delivered to such officer as the Court out of which such process issued should direct, and to be dated on the delivery thereof." Three forms of appearance are prescribed in schedule No. 2, and to the following effect:—One of these forms is to be adopted, according to the facts of the case, as, first, where a single defendant appears in person; secondly, where an attorney appears for a single defendant or for all the defendants; and, lastly, where an attorney for the plaintiff enters an appearance according to the statute, 12 Geo. 1, c. 29; so that when one of several defendants appears separately, or where an attorney appears only for one of several defendants, a different form must be framed.

In the Exchequer, there was in force, before the 2 Will. 4, c. 39, an express rule, that, on every appearance to be entered by the sworn or side clerks, as officers of the office of Pleas, they should cause to be put the name and address of the attorney at whose instance, and the day on which the same should be entered, by the defendant's name, by the said sworn clerks, in proper books, having an alphabetical index book of reference, entered by the plaintiff's name, to be provided by the Clerk of the Pleas for each term, and which books should lie open to the inspection of the said attornies admitted, as mentioned in a foregoing rule of that term, and their clerks, without fee or reward. (Rule M. T. 1830). And by another rule of the same term, "if the whole number of defendants, where there were several, should appear by the same attorney at the same time, the names of all the defendants should be inserted in one appearance. But it seems that such rules were virtually annulled by the 2 Will. 4, c. 39, s. 2, thus requiring a different and less explicit form of appearance to be adopted, and as given in the schedule No. 2.

† Nor can it be entered by the plaintiff, where the defendant has been discharged out of custody, the affidavit of debt being insufficient, unless it be so stated in the rule ordering the defendant's discharge. (*Wilkins* v. *Parker*, T. T. 1836, B. C., 5 D. P. C. 150).

relation to the first day of term; the officer says there is no relation of an appearance. The plaintiff should have taken care not to have signed judgment till after the defendant was in Court.

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2. *By one of several Defendants.*

PEPPER *v.* WHALLEY, T. T. 1834. C. P. 1 *Bing. N. S.* 71; 2 *D. P. C.* 821.

WRIT against two defendants. Separate declarations had been delivered, on an application to set aside proceedings for irregularity. The Court held, that, by appearing separately, it did not enable the plaintiff to declare against them separately.

When there are several defendants in a joint action, they may appear jointly or separately*.

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3. *Must correspond with Process*†.

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2nd.—BY PLAINTIFF.

(*a*) WHEN, AND WITHIN WHAT TIME‡.

THOMPSON *v.* PHENEY, *cited* 2 *Dowling's Stat.* 142—S. P. GIBSON *v.* WILSON, M. T. 1838, *cited Bagley's Pr.* 83; S. C. 1 *Arnold*, 371.

*Patteson*, J., is stated to have said, that a practice had crept in, that the party seeking to enter a common appearance brought any

To entitle a plaintiff to enter

* When one of several joint defendants apprehends collusion between the other defendants and the plaintiff, for some other reason, wishes to defend separately, he should employ a different attorney, and appear and plead and defend separately, in every stage throughout the suit.

† It is essential that there should be no variance in the names and number of the parties, between the writ and appearance. Any material discrepancy will render the latter a nullity; but if a defendant has been misnamed in the process, he may, in the memorandum of his appearance, describe himself correctly; thus, "E. D., served with a writ of summons in this action by the name of C. D.," or "E. D., sued as C. D." (3 T. R. 611; 6 M. & S. 327); and thereupon the plaintiff may declare against the defendant as E. D. served with process in this suit by the name of C. D. (2 N. R. 132). And if the defendant appear in the very name in which he was sued, then, however erroneous the plaintiff may declare against him, and proceed by that name to judgment and execution, and take him or his goods by the wrong name. (Ibid.)

‡ At common law, there was no mode of enforcing an actual appearance by the defendant. To mitigate this evil, the 9 & 10 Will. 3, c. 25, s. 33, (obsolete in practice, 5 D. P. C. 650), authorizes the Court to give judgment to the plaintiff for a penalty of 5*l.*, with immediate execution, in case the defendant does not appear; and as the Court, upon affidavit and motion, would award execution for such penalty, the proceeding was usual, especially when the debt was small; but still the plaintiff could not proceed further in the action. To remedy this defect, the 12 Geo. 1, c. 29, s. 1, enacts, "that, in case the defendant do not duly appear, it shall be lawful for the plaintiff, upon affidavit being made and filed in the proper Court of the personal service of such process as aforesaid, which affidavit shall be filed gratis, to enter a common appearance, or file common bail for the defendant, and to proceed thereon as if such defendant had entered his appearance."

*Time of, by Plaintiff*.—If the defendant do not appear within eight days *inclusive* after service of the writ of summons, or copy of the capias, the plaintiff, at the expiration of the eight days, whether in term or vacation, may appear for the defendant, according to the statute, 12 Geo. 1, c. 27; (see 7 & 8 Geo. 4, c. 71, s. 5); provided, that if the last of the eight days shall fall on a Sunday, Christmas-day, or any day appointed for a public fast or thanksgiving, in either of such

an appearance for the defendant, he must swear positively to personal service*.

kind of affidavit, which stated that the defendant had been served personally, and then set forth the particular mode of service, which did not amount to personal service at all, and that course of proceeding was exceedingly improper; and he had given directions that it should be discontinued for the future.

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STARKIE *v.* SKILBECK, T. T. 1837. C. P. 6 *D. P. C.* 52.

And where the keeper of a lunatic declined to allow him to be seen, the Court refused to dispense with this requisition.

ON motion for leave to enter an appearance, it appeared that the defendant was insane, and a distringas had issued, to which there was a return of nulla bona and non est inventus; but affidavits being produced that the defendant was a lunatic, that it was known where the defendant was living, but that his keeper refused to allow him to be seen, in order that process might be served,

*Per Cur.*—We cannot interfere. By the affidavit, a presumption is raised that the defendant is in existence, and can be found; and it is suggested, as a reason for dispensing with personal service, that plaintiff is prevented from reaching him by a man in whose custody he is, that is not a sufficient reason.

*See Rawson* v. *Moss*, 8 *D. P. C.* 412; S. P. *Jones* v. *Evans*, *Id.* 425; S. C. 6 *M. & W.* 420.

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SAUNDERSON *v.* BOURN, T. T. 1834. Ex. 2 *D. P. C.* 338.

Leave cannot be obtained for a plaintiff to appear for a defendant, unless the Court is satisfied that every means to find him has been tried in vain†.

MOTION for leave for the plaintiff to appear for defendant. It was sworn that the plaintiff had been unable to discover any residence or property of the defendant, and that due diligence had been used to execute a distringas.

The Court held, that the affidavit ought to shew that reasonable diligence had been used.

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COPELAND *v.* NEVILL, T. T. 1835. K. B. 3 *A. & E.* 668.

And what those means were must be disclosed to the Court.

ON motion for a rule for entering an appearance, under the 2 Will. 4, c. 39, the affidavit stated, that the deponent had made diligent inquiry to find the defendant, in order to serve him with a copy of the writ, but was unable to find him, or discover his abode, or any goods or chattels belonging to him.

But the Court said,—The way in which inquiry has been made must be described, to satisfy the Court that proper means have been used to serve and execute the writ.

cases, the following day is to be construed in the computation as the last of the eight days. On plaintiff appearing for defendant, (see stat.), he may declare, and proceed to judgment and execution as usual; (2 Will. 4, c. 33, s. 16); unless the writ shall have been served or executed on any day between the 10th August and 24th October, when plaintiff cannot declare in that interval, though defendant is bound to appear within the time prescribed. (See 2 Will. 4, c. 29, s. 11).

If the copy of the writ were served by a sheriff's officer, or any other person, the Court, upon application, would compel him to make an affidavit of service. (*Rex* v. *Rudge*, 1 Blac. R. 432; see also *Clark* v. *Elwick*, 1 Stra. 1).

And where entered by the plaintiff, it cannot be considered as such a step taken as to preclude the defendant from applying to set aside the service of the writ. (*Davis* v. *Skerlock*, H. T. 1839, B. C., 7 D. P. C. 530).

* And R., G. M. 3 Will. 4, c. 3, every affidavit on which an appearance shall be entered for the defendant shall mention the day on which the date of the service was indorsed on the writ.

† Unless defendant admits he has been served with the writ of summons. (*Saunders* v. *De Chastelain*, T. T. 1836, B. C., 5 D. P. C. 154).

RICHARDSON *v.* DALEY, M. T. 1838. Ex. 7 *D. P. C.* 25.

It may be entered by the plaintiff long after the writ has issued and the defendant given a cognovit*.

A WRIT of capias issued against two defendants, A. and B., upon which A. alone was arrested, and remained in prison until he was superseded. On the 26th September, 1838, B. executed a cognovit; upon which the plaintiff's attorney entered an appearance and filed a declaration against both defendants. It was contended, 1st, that the cognovit did not give any authority to enter an appearance; and, 2ndly, that the cognovit was not given, nor the appearance entered, until seven months after the writ of capias had expired.

*Sed per Cur.*—The cognovit is supposed to be given by a party who is in Court, and implies an authority to the person to whom it is given to enter an appearance or do whatever is necessary to make it available. As to the second objection: suppose a defendant chooses to come in voluntarily, after a writ has expired, is there any doubt that such would be a good appearance?

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DAVIS *v.* COOPER, T. T. 1833. Ex. 2 *D. P. C.* 135.

An appearance entered by the plaintiff after the 8th day, renders one subsequently made by the defendant a nullity.

THE defendant had been served on the 20th May, and had not appeared. The plaintiff, on the 29th, appeared for him, and delivered declaration. On the 7th June, defendant entered an appearance, of which the plaintiff had notice; the latter, without demanding a plea, signed judgment.

*Per Cur.*—After the plaintiff had appeared, the defendant's appearance could do no good. He should have done it in proper time. The effect of his being allowed to appear and give notice of it would be to get twenty-four hours' more time to plead, after he has had eight days without having entered an appearance.

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ROBERTS *v.* SPURR, E. T. 1835. B. C. 3 *D. P. C.* 551.

And the omissions on the part of the plaintiff to appear, as well as the defendant, will render the proceedings altogether null†.

MOTION to set aside declaration and interlocutory judgment, on the ground that neither plaintiff nor defendant had appeared before the judgment was signed. On shewing cause, it was contended, that the application was not made within a reasonable time, and that the irregularity had been waived by the defendant accepting a declaration. But, by *Williams.* J.—There being no person before the Court against whom a judgment can be signed, the present judgment must be a nullity.

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RUTTY *v.* AUBER, M. T. 1833. Ex. 3 *Tyrw.* 591.

If defendant has appeared, and plaintiff inadvertently appears for him also, the defend-

AN appearance was entered by the defendant, in due time, on 10th January; but not being found in the appearance-book, on search by the plaintiff's attorney, he entered a common appearance for him on the 21st, and proceeded to file his declaration, and gave notice of that step to the defendant on the 26th. The plaintiff

* Where a defendant improperly got possession of the writ of summons, the Court allowed an appearance to be entered by the plaintiff, and ordered the defendant to pay the costs. (*Brook* v. *Edridge*, E. T. 1834. Ex., 2 D. P. C. 647).

† But, in *Williams* v. *Strahan*, 1 N. R. 309, which was not referred to by the counsel or the Court in *Roberts* v. *Spurr*, the Court of Common Pleas held, that, if a defendant accept a declaration and act as if an appearance has been entered for him, the Court will not afterwards permit him to set aside a judgment for want of an appearance having been entered.

ant must object to the irregularity in due time.

signed judgment on the 4th February, and levied execution thereon on the 19th. The defendant's attorney then said, that he had entered an appearance for the defendant; and it was decided, that, though that entry of appearance made the demand of plea necessary, yet, as the plaintiff's attorney was suffered to remain in ignorance of it, after he had committed the first irregularity consequent on that ignorance, viz. in giving notice of declaration filed, on 26th January, the judgment ought to stand.

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COOK *v.* ALLEN, H. T. 1833. Ex. 1 *D. P. C.* 676; S. C. 1 *C. & M.* 350.

In the Exchequer, the plaintiff has four terms to appear for the defendant, and the latter is not entitled to an imparlance unless he has appeared.

THE declaration was filed, and notice thereof served on the 20th November, and a rule to plead in eight days was given on the 22nd November. On the 1st December, interlocutory judgment was signed. Notice of taxation was duly given, final judgment was signed, and a writ of execution issued on the 13th December. A rule was obtained on two grounds: first, that common bail was not filed in due time; secondly, that the defendant was entitled to an imparlance to Hilary Term; and therefore the judgment was irregular.

Lord *Lyndhurst*, C. B., after consulting the Master—The Master reports to us, that the practice of this Court is, that a plaintiff may file common bail for the defendant within four terms, and the defendant cannot be entitled to an imparlance unless he appears.

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### (*b*) MODE OF*.

REG. GEN. H. T. 2 Will. 4, r. 3.

Affidavit not to be sworn before the attorney or his clerk;

No affidavit of the service of process shall be deemed sufficient, if sworn before the plaintiff's own attorney or his clerk.

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REG. GEN. H. T. 2 Will. 4, r. 6.

or before the agent.

WHERE an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

* The plaintiff must enter the appearance for the defendant by the same name as that stated in the process; and, if a misnomer be discovered, still the plaintiff should enter the appearance in the wrong name, the same as in the writ, and declare against him by the same name; and, as the defendant cannot, since the 3 & 4 Will. 4, c. 42, s. 11, plead his misnomer in abatement, the only inconvenience would be a summons, under that section, compelling the plaintiff to state the proper name in the declaration, and to pay the costs of the summons and order. It would be irregular for the plaintiff to enter the defendant's appearance in his correct name; (3 T. R. 611; 2 N. R. 132; 11 East, 225); and it has been considered that the plaintiff cannot, after appearing for the defendant in the name in the process, declare against the defendant by his right name; but since the above enactment, that point may perhaps be doubtful.

II. ON A WRIT OF CAPIAS*.

V. ATTORNEY'S UNDERTAKING TO APPEAR†.

VI. FEES PAYABLE ON‡.

## VII. STRIKING OUT, WHEN IMPROPERLY ENTERED.

PAGET *v.* THOMPSON, T. T. 1826. C. P. 3 *Bing.* 609.

Where an appearance is improperly entered, it may, on application, be struck out;

THE defendant was an infant; he did not appear by guardian, but by attorney. On a rule to shew cause why the defendant's appearance entered on the filacer's book should not be struck out, and why the defendant should not appear by guardian, and his plea should not be made conformable thereto—

The Court made the rule absolute, thinking the proceeding a trick to enable the defendant to take advantage of the objection on error.

WARREN *v.* LOVE, E. T. 1839. B. C. 7 *D. P. C.* 602.

or, if not entered according to the 2 Will. 4, c. 39, it may be treated as a nullity.

THE question was, whether the defendant had entered an appearance according to the 2 Will. 4, c. 39. The defendant had entered his appearance, "In Q. B., Thomas Warren, plaintiff,

* If there be two or more defendants named in the writ, the plaintiff or his attorney may order the sheriff to arrest one or more only of them, and to serve a copy of the writ on one or more of the others; which order shall be duly obeyed by the sheriff; and such service shall be of the same force and effect as the service of a writ of summons, and no other. (2 Will. 4, c. 39, s. 4. See post, tit. "*Summons*"). The sheriff, within six days, must indorse the date of the service upon the writ, as above mentioned. (2 Will. 4, c. 39, s. 4). After being thus served, the defendant must enter a common appearance within eight days after such service; otherwise the plaintiff may enter an appearance for him, and proceed thereon to judgment and execution. (2 Will. 4, c. 39, s. 16).

† This undertaking should be in writing, which the Court would, on motion, enforce by attachment, or strike him off the roll; but they would not thus interfere, unless the undertaking were in writing and signed by the attorney. If an attorney give an undertaking to the plaintiff or his attorney, to appear to a bailable action, he must perfect bail above, or render the defendant, or be attached, or struck off the roll. (4 East, Rep. 569; 1 T. R. 422). An undertaking of this nature is not within the Statute of Frauds; or, if it be, it may be enforced by the summary power of the Court. (*Evans* v. *Duncombe*, H. T. 1831, Ex., 1 C. & J. 392; *In re Greaves*, Gent., H. T. 1827, K. B., 1 C. & J. 374, n.; S. C. 1 Tyrw. 283).

If it be for the appearance of an infant, the Court will compel him to do it properly; and if he appear by attorney, they will compel him to alter it, and enter an appearance by guardian. (*Stratton* v. *Burgiss*, 1 Stra. 114).

Where, in a non-bailable action, the defendant's attorney indorsed an undertaking to appear, and the plaintiff afterwards proceeded in the action as if an appearance had been entered, and signed judgment for want of a plea, the Court held it to be irregular. (*Martin* v. *Mahony*, 5 D. & R. 609). And, in a similar case, *Williams*, J., held the judgment to be a nullity altogether; and that the defendant therefore was not precluded, by any lapse of time, from moving to set it aside. (*Roberts* v. *Spurr*, 1 Har. & W. 201; 3 D. P. C. 551, ante 249).

‡ (See remarks of *Bayley*, B., in *Attorney-General* v. *Carpenter*, 1 Tyrw. 280); By Reg. Gen. M. T. 1832, r. 2. The fee is for entering an appearance, for every defendant, 1*s.*, unless an appearance shall be entered for more than one defendant by the same attorney; and, in that case, for every additional defendant, 4*d.*

against George Love, defendant." It was contended, that it ought to appear whether the appearance was in person or by attorney; the form here adopted, however, was imperfect, either as an appearance in person or by attorney.

*Per Williams*, J.—The defendant's entering of the appearance is a nullity, according to the forms given by the statute. The first to be pursued is, where a party appears in person; and the second, where he appears by attorney. In the latter case, the name of the attorney is to be given, and he is to be declared as the person who so appears for the defendant. In the other case, the party is stated to appear in person. The statute describes that to be the form of entry. It is, therefore, no entry at all.

## VIII. REMEDYING MISTAKE IN ENTERING, AND CONSEQUENCE OF MISTAKES IN*.

ROBERTS *v.* SPURR, E. T. 1835. B. C. 3 *D. P. C.* 551; *sed vide* WILLIAMS *v.* STRAHAN, 1 *N. R.* 309.

Judgment signed in an action to which there has been no appearance, is a nullity.

No appearance to the process had been entered by the defendant, or by the plaintiff for him; the defendant, however, accepted the declaration and never returned it. Interlocutory judgment was signed for want of a plea. The defendant was aware of the irregularity on the 5th April, the motion was made on the 5th May.

*Per Williams*, J.—There being no person before the Court against whom a judgment can be signed, the present judgment must be a nullity. The plaintiff has brought this result upon himself; because he might, under the circumstances, have entered an appearance for the defendant. The question then is, whether, by the defendant's delay, the objection to the proceedings is removed. There is this difference between an irregularity and a nullity—an irregularity may be waived, but a nullity cannot. I must consider the proceedings here a mere nullity. I am of opinion that the present rule must be made absolute; though without costs.

* Where, by mistake, the plaintiff entered an appearance for the defendant by a wrong name, the Court, upon motion, ordered the filacer to amend the appearance, defendant's name being correct in the writ. (3 Wils. 19; 1 Stra. 83). And, where the defendant had got possession of the writ of summons, it was considered that the plaintiff might enter an appearance for the defendant without any indorsement of the claim for debt and costs, and the Court compelled the defendant to pay the costs. (2 D. P. C. 647).

If a plaintiff irregularly enters an appearance for the defendant, the latter must apply to the Court as soon as such steps are taken by the former as shew his intention to proceed on the appearance. (*Coleridge*, J.—*Strange* v. *Freeman*, H. T. 1336, B. C., 5 D. P. C. 407). The affidavit by a defendant, to set aside an appearance irregularly entered by the plaintiff, after notice that the service of process was not indorsed, need not deny that any other process had come to the defendant's knowledge, if it denies the service of any subsequent writ. (*Williams*, J.—*Wintle* v. *Hogg*, B. C. 1839, B. C., 7 D. P. C. 623.)

**Appeal.** See tit. *Error—Poor—Sessions.*

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**Appendant and Appurtenant.** See *Meaning of Words*, 1 *B. & C.* 350; 15 *East*, 109; 3 *Taunt.* 24, 147; 3 *M. & S.* 171; 5 *B. & C.* 156; 9 *Id.* 671; 2 *B. & Ad.* 164.

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**Appointment.** See tit. *Attorney—Costs.*

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**Appraisement*.** See tit. *Distress.*

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## Apprentice.

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(2 *Peters. Abr.* 1).

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* Although there be a written stamped appraisement, a broker may state the value from recollection. (*Stafford* v. *Clark*, H. T. 1833, N. P., 1 C. & P. 25. See 55 Geo. 3, c. 184; and 12 East, 1; 2 Chit. Rep. 399; 5 M. & S. 240). Where an in-coming tenant agrees to take fixtures at a valuation, to be made by two brokers, and such valuation is made, and the tenant enters, the value of the fixtures may be recovered under a count on an account stated. (*Salmon* v. *Watson*, 4 B. Moore, 73. See *Hallen* v. *Runder*, 1 C., M., & R., 266).

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## I. WHO MAY BE*, AND WHO MAY TAKE†, AND WHO CONSIDERED AS AN APPRENTICE.

REX *v.* MAYOR OF DONCASTER, H. T. 1828. K. B. 1 *M. & R.* 545; 7 *B. & C.* 630.

An articled clerk to an attorney is not such an apprentice as to be entitled to his freedom when the qualification is exercising a trade.

ON motion for a mandamus, commanding the mayor of A., &c., to admit and swear one B. into the place and office of a freeman or free burgess of the borough of A., it appeared that B. had been an articled clerk or apprentice to a freeman of the borough, who was an attorney, for the space of seven years, and had duly served him all that time; that his articles had been duly enrolled according to the statute, and had also been enrolled with the corporation, in obedience to a by law; that, at the expiration of the term, he applied to be admitted a freeman by reason of this apprenticeship. It was contended, that, in the absence of any instance of the admission of an attorney's clerk, it was out of the question to say that his apprenticeship, as it is called, to an attorney, was an apprenticeship to a person exercising a trade.

*Per Cur.*—It is quite impossible to say that an attorney is a trade, or his articled clerk an apprentice; therefore, this rule must be discharged.

* Any person capable of executing a deed may bind himself as an apprentice; and, although he be under age at the time, he is bound by the indenture to serve his master during the time therein specified. (5 Eliz. c. 4, s. 43; *Rex* v. *Sultan*, 1 Bott. 617; *Rex* v. *Arundel*, 5 M. & S. 257). At least, unless he become of age before the expiration of it; at which, it appears, that he may avoid the contract if he will. (*Ex parte Davis*, 5 T. R. 715; *Ex parte Gill*, 7 East, 376).

† Any person capable of executing a deed may take an apprentice; even a person under age may do so. (*Rex* v. *St. Petrox*, 4 T. R. 196). But a married woman cannot take one; because her deed is altogether void, and not merely voidable. (*Rex* v. *Guildford*, 2 Chit. Rep. 284). It is not necessary, however, to the validity of an indenture of apprenticeship that the master should exercise any trade, art, or mystery. Where a girl was bound apprentice to a common day labourer, to learn "the art and mystery of a housewife," the Court held the indenture not invalid on that ground. (*Rex* v. *St. Margaret's, Lincoln*, Burr. S. C. 728).

## II. INDENTURE OF APPRENTICESHIP, AND CONTRACTS FOR APPRENTICESHIP.

### (*a*) Indenture of*.

**Regina *v.* Inhabitants of Barmston, H. T. 1838. K. B. 3 *N. & P.* 167.**

An indenture of apprenticeship, ante-dated fraudulently, to evade 5 Eliz. c. 4, is void†.

An infant, by an indenture of apprenticeship, put himself an apprentice to his father to learn the trade of a tailor; the indenture first bore date 12th December, 1813, but the parties, for the fraudulent purpose of enabling the minor to exercise the trade of a tailor, and have the full benefit of the 5 Eliz. c. 4, then in full force, after five years apprenticeship caused the indenture, before execution, to be ante-dated two years.

The Court held, that, if the indenture was fraudulently ante-dated to contravene the 43 Eliz., it was void.

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### (*b*) Contracts for.

**Phillips *v.* Jones, E. T. 1834. K. B. 1 *A. & E.* 333.**

An agreement for an apprenticeship, not under seal may become operative by service, so as to give a right of action for compensation for services‡.

The defendant agreed with plaintiff's father to receive plaintiff, who was a minor, into his service on trial, and to take him as apprentice, if approved of. Plaintiff went into the service, and worked for defendant nearly two years. After several applications made during that time by the father, defendant told the father that plaintiff should serve out the two years and then be bound, the father paying defendant 10*l.* This was agreed to, but defendant shortly after quarrelled with plaintiff, and told him to go home about his business. Plaintiff went home; and on the father applying to defendant for an explanation, the latter told him to go and do his

* At common law, no particular description of instrument was requisite to create an agreement of apprenticeship between the contracting parties. The statute of 5 Eliz. c. 4, required the binding of an apprentice to be by *indenture*, for the purpose of exercising *trades*. But now, by the 54 Geo. 3, c. 96, s. 2, this appears no longer absolutely necessary for that purpose, the latter act enacting, "That it shall be lawful for any person to take, or retain, or become an apprentice, though not according to the 25th, 30th, and 41st sections of the statute of Elizabeth; and that indentures, deeds, and *agreements in writing*, entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual in law;" with a proviso, however, that such enactment shall not affect the *immemorial customs of towns or by laws* of corporations, &c. But though, by the operation of this statute, the binding need not be by DEED, (see 5 Geo. 3, c. 184, Sch. Part 1), for the purpose of *exercising a trade;* yet, in order to gain a *settlement*, the instrument of apprenticeship must be by deed, (see 3 Will. & Mary, c. 11, s. 8), though it need not be *indented.* (31 Geo. 2, c. 11, s. 4; 4 T. R. 770). No *parol* binding would be sufficient; (see Burr. S. C. 290; 4 T. R. 769; 2 M. & R. 217; 8 B. & C. 88); and if for more than a year, it would be unavailing, as falling within the 4th section of the Statute of Frauds. (29 Car. 2, c. 3).

† And where it was prohibited by stat. to bind a child under eight years of age as a chimney-sweep, and a child of five years was, notwithstanding, bound, the Court held the indentures void altogether, and not merely voidable. (*Rex* v. *Hipswell*, 8 B. & C. 466; S. P. *Rex* v. *Gravesend*, 3 B. & Ad. 240, abridged post).

‡ But, where L. agreed, on behalf of his son, that he should serve M. from the date of the agreement until a certain specified time, M. paying, at the expiration of the said term, five pounds to the son, L. to find his son clothes, washing, and all other necessaries, and M. meat, drink, and lodging. Held, not to be a contract of apprenticeship. (*Rex* v. *Billinghay*, M. T. 1836, K. B., 5 A. & E. 676; S. C. 1 N. & P. 149, abridged post, tit. *Settlement*).

worst. The father then applied to defendant, requiring him either to take plaintiff as his apprentice or recompense him for his work; but defendant refused. Plaintiff, by his next friend, brought an action to recover compensation for his service.

Lord *Denman*, C. J., put it to the jury, on these facts, whether or not the defendant's conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded; and he further stated, that if they thought it was, they were to give plaintiff such compensation for his work as they thought proper. The jury found a verdict for the plaintiff, with damages, by way of compensation for his services. The Court held, that the direction was right.

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### (*c*) Stamp.

#### 1. *Of the Indenture.*

King *v.* Low, E. T. 1829. N. P. 3 *C. & P.* 620.

In fixing the amount of stamp, the sum paid, and not agreed to be paid, is the criterion*.

In an action on an indenture of apprenticeship, it appeared that the premium agreed for was 20*l.*, but 19*l.* 19*s.* only was paid, and that sum was inserted in the indenture, and the stamp according to the latter sum.

Lord *Tenterden*, C. J., held, that it was sufficient, within the 8 Anne, c. 9†, being the sum actually paid.

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Rex *v.* Inhabitants of Ide, T. T. 1831. K. B. 2 *B. & A.* 866.

And where a stamp is necessary it need not be affixed within two months, as directed by 8 Anne.

The assignment of a parish apprentice was executed by B. and L., and two justices; and at the time of the production of it in Court, on the hearing of an appeal, it bore a 20*s.* stamp, which had been affixed on payment of the penalty a short time before, and more than two months after the date and making of it. B. paid L. 5*l.* as the consideration of this transfer of the apprentice to him, but this was not set out in the assignment, nor was any mention made of it therein.

The Court held, an assignment of a parish apprentice is not subject to the regulations imposed by the stat. 8 Anne, c. 9, and need not therefore be stamped within two months, nor must the consideration paid for such assignment be set forth in it.

* See also 2 Peters. Ab. 6.

† The 8 Anne, c. 9, s. 36, enacts, "That all indentures of apprenticeship, &c., signed within London, Westminster, or bills of mortality, shall be stamped within one month after date. By sect. 37. every indenture signed elsewhere in Great Britain shall be stamped within two months. As to the amount, see 55 Geo. 3, c. 184. (2 Peters. Ab. p. 19).

The indenture must be properly stamped according to the premium or consideration given, and the particular kind of stamp; and if the sum so paid or contracted for be not truly inserted in words at length, the indenture is void, 8 Anne, c. 9, s. 35. (3 T. R. 353; 5 B. & Ald. 412; 1 Bott, 545). If an indenture binds an apprentice to two masters in different trades, to serve part of seven years with one, and the rest of the term with the other, one stamp suffices. (8 B. & C. 247). And if his friends covenant to maintain him, and provide him with clothes, this is not such a benefit as is liable to the duty imposed by 8 Anne, c. 9, s. 45. (4 Term Rep. 732). If the master stipulate for 4*d.* out of every shilling of his earnings; (1 East, 601); and if he is to allow his master 2*s.* a-week, and to have wages and provide for himself during the term, the indenture does not require the additional stamp charged—by 44 Geo. 3, c. 98, Sched. A. (See 1 M. & S. 151).

MANN *v.* LENT, E. T. 1830. K. B. 10 *B. & C.* 877; S. C. *M. & M.* 240.

A BILL of exchange was given for the amount of premium to the master upon an indenture of apprenticeship. For some months the apprentice continued with the master, and was boarded and instructed by him. Disputes then arose: it was discovered that the indenture was on a wrong stamp, and the apprentice left his master.

And an indenture improperly stamped may be restamped,

The Court held, that as the apprentice was maintained and instructed by his master for five months, and might have compelled him to continue that maintenance and instruction, by causing the indenture to be properly stamped, pursuant to the stat. 20 Geo. 2, c. 45, s. 5, there was not a failure of consideration.

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REX *v.* PRESTON, H. T. 1834. K. B. 5 *B. & Ad.* 1029; 3 *N. & M.* 31.

AN indenture of apprenticeship was dated 27th April, 1825. On the 6th July, 1832, it was stamped with a 1*l.* stamp, and 5*l.* penalty paid for stamping. In September, 1825, the double duty was paid, viz. 1*l.* more, but not another penalty of 5*l.*

as the Court will not inquire when it was affixed.

*Per Cur.*—When the question is, whether the instrument is evidence, it is only necessary for the Court to see that the instrument bears the proper stamp, without entering into the question of when, or whether, that stamp was properly affixed upon the payment of the proper penalty.

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REX *v.* AYLESBURY, E. T. 1832. K. B. 3 *B. & Ad.* 569; *Semble*, S. P. REX *v.* FAKENHAM, H. T. 1835. K. B. 2 *Ad. & E.* 528, *abridged, and at* p. 259.

A PAUPER was bound apprentice by the trustees of a public charity. The master covenanted to find him meat, drink, apparel, washing, &c. Before the execution of the indenture, the father of the pauper, who was not a party to it, agreed with the master to find the pauper clothing and washing during the term, and he did so. It did not appear that the trustees were privy to this engagement.

But an indenture need not be stamped where executed by the trustees of a charity, the master to find him in clothes, &c., though the boy's father, who was no party, without their consent, engages to clothe him.

The Court were clearly of opinion, that if the friends of an apprentice covenant to maintain him, and to provide him with clothes, this is not such a benefit as renders the indenture liable to stamp duty; and did not think the circumstance of the master covenanting made any difference.

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REX *v.* BOURTON-UPON-DUNSMORE, T. T. 1829. K. B. 4 *M. & R.* 631.

A SUM was paid to the master upon the execution of an indenture of apprenticeship, but it was agreed by the mother of the apprentice that something more should be given, and only the sum actually paid at the time was inserted in the indenture as the consideration. The mother afterwards paid the master a further sum; but neither her husband nor the apprentice knew the fact of the agreement, or that of the payment of the additional sum. The stamp affixed would have been sufficient if the additional sum had been mentioned.

And in no case does any such arrangement, even to pay an increased premium, make the indenture void, if there be no fraud on the revenue.

The Court held, that, under these circumstances, the indenture was not void for want of the insertion of the true consideration. There was no binding agreement for more; it was all voluntary, and there was no fraud upon the stamp act, for the stamp would have been the same on the larger sum.

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REX *v.* MABE, T. T. 1835. K. B. 3 *Ad. & E.* 531; S. C. 5 *N. & M.* 241.

The exemption in the 37 Geo. 3, c. 111, from stamping, does not apply to an indenture where no consideration is given.

BY the third section of the 37 Geo. 3, c. 111, it is enacted as follows: "Provided also, that nothing in this act contained shall be construed to extend to any indenture of apprenticeship when a sum or value not exceeding 10*l.* shall be given, or contracted with or in relation to the apprenticeship." On the question, whether the section of the statute extended only to exempt money contracts where a sum not exceeding 10*l.* was paid, or whether it applied to an indenture of apprenticeship, where no sum was given—

*Per Cur.*—It is an evident mistake in the act; but we have no power to amend the error of the legislature. We certainly think that the construction to be put upon the third clause of the act, that where a sum or value is paid, not exceeding 10*l.*, the deed of apprenticeship shall be exempt, only applies to money contracts; and, consequently, that where no consideration is paid, the deed is not exempt.

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REX *v.* CHURCH HULME, E. T. 1831. K. B. 5 *B. & Ad.* 1029, n.

The 8 Anne, c. 9, as to time of stamping, is not repealed by the 55 Geo. 3, c. 184.

IN this case the indenture of apprenticeship (a premium having been paid with the apprentice) was not stamped with the ad volorem duty, nor within the time prescribed by the 8 Anne, c. 9. On the question, whether that statute was repealed, the case of *Rex* v. *Chipping Norton*, 4 B. & A. 412, was relied upon, where it was decided that an indenture was void, because, though it was stamped at the time it was produced in evidence with the stamp required by the 55 Geo. 3, c. 184, it had not been stamped within the time required by the statute 8 Anne, c. 9.

The Court concurred in that case, and held, that the 55 Geo. 3, c. 184, did not repeal the provision of 8 Anne, c. 9, as to the time for stamping indentures of apprenticeship.

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SMITH *v.* AGETT, E. T. 1840. Ex. 8 *D. P. C.* 411.

The 9 Anne, c. 9, limiting the time for stamping an indenture of apprenticeship, does not apply where no consideration is expressed.

AN apprentice-deed, *in which no consideration was expressed*, had been received in evidence, though stamped more than one year after the execution. It was objected that 9 Anne, c. 9, limiting the stamping to particular times had not been complied with.

The Court held, it might be received in evidence. No consideration being stated, it was not within that act, and the 55 Geo. 3, c. 184, imposes no limitation as to time.

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### 2. *Of the Assignment*.*

REX *v.* LLANGUNNOR, T. T. 1831. K. B. 2 *B. & Ad.* 616.

Parish money paid as a premium on the assignment of a parish apprentice, does not render a stamp necessary.

AN unstamped assignment of a parish apprentice stated that D. E., the new master, in consideration of 3*l.* 10*s.* paid him by H., the old master, agreed to accept the apprentice, &c.

The Court held, that parol evidence was admissible to shew that the money paid on the assignment of the apprentice was parish money, and therefore that the instrument did not require a stamp.

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REX *v.* FAKENHAM, H. T. 1835. K. B. 2 *Ad. & E.* 528; 4 *Nev. & M.* 553.

Nor where the fund is supplied by a public charity.

THE master received a premium from trustees under a charitable bequest, and after service of above three years, at the request of the apprentice, agreed verbally that he should serve the remainder of his time with the master of a different trade, and pay a sum, as part of the premium paid on the binding; which was done without the knowledge of the trustees. On the question, whether the indenture of assignment required a stamp, or whether it came within the exemption as to indentures, or assignments thereof, by or at the sole charge of any public charity—

The Court held the assignment void, for want of a stamp. The assignment was a new arrangement entirely. It was impossible to say here that it was any act in which the trustees concurred, or that money of the charity was at all concerned.

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## III. MASTERS' RIGHTS AND LIABILITIES.

### (*a*) RIGHTS OF MASTERS†.

EARRATT *v.* BURGHART, T. T. 1828. N. P. 3 *C. & P.* 381.

For what time a master is entitled to recover for board and lodging of an apprentice sent on trial,

IN an action for board and lodging, it appeared that the defendant's son went to reside with the plaintiff, with a view to his taking him as an apprentice, and continued there for three months, behaving well; and after that, for six months longer, behaving so ill, that he was at length dismissed by the plaintiff; and to a demand made by the plaintiff for his board and lodging, the de-

* An assignment of an apprenticeship to another master, if by indorsement on the indenture, or other written agreement, must also be stamped, as under:—

| | £ | s. | d. |
|---|---|---|---|
| From 1783 to 1804, with an agreement stamp ..... | 0 | 10 | 0 |
| „ 1804 to 1808, ditto ditto ..... | 0 | 15 | 0 |
| „ 10 Oct. 1808, to 31 Aug. 1815, ditto..... | 0 | 15 | 0 |
| But, if the indenture contained more than 1080 words ..... | 1 | 10 | 0 |

And if a new consideration or premium were given, the same rate of duty as for the original consideration.—From 1815 the duty on assignments is charged upon the same plan, where there is a new premium, &c., or if no premium, then the same duty as on an original binding without premium. The same rules apply to any subsequent assignment.

† Where an apprentice is bound to two partners, on the death of one he becomes the apprentice of the survivor. (*Rex* v. *St. Martin's*, 1 Har. & Woll. 69).

Where the hand of the plaintiff's apprentice had been permanently injured, it was held, that he might recover *prospective* damage; for the damage alone is not the cause of action. (*Hodsoll* v. *Stallebrass*, H. T. 1840, Q. B.; 3 P. & D. 200; Abridged, post, tit. *Damages*.

is a question for the jury; at all events, he cannot recover for the first month.

fendant promised to call on the plaintiff, without denying the claim. —Lord *Tenterden*, C. J., directed the jury that they should not allow for the first month, that being the usual period for boys to go on liking, nor for the three months he behaved well; and, with respect to the remaining part of the time, according as they thought there was any contract, express or implied, for any part of the board and lodging.

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WILKINS *v.* WELLS, Sum. Ass. 1825. N. P. 2 *C. & P.* 231.

Nor can he recover at all, if he sends the apprentice away.

THE defendant took a lad a month on liking, with the intention of his being bound as an apprentice, if he and the lad should suit one another. The boy stayed several months without any indenture being executed. No fresh agreements were entered into. The defendant turned the apprentice away. To an action for money lent, the defendant pleaded, as a set-off, the board and lodging of the plaintiff's son.

*Per Garrow*, B.—There is no ground for the set-off. This lad was intended to have been placed as an apprentice to the defendant, and went on what is called liking for a month. At the end of that month no indentures are executed, and no fresh arrangements made; but the lad continues to stay with the defendant as before. No agreement was entered into that the plaintiff should pay for his board.

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WRIGHT *v.* GIHON, H. T. 1829. N. P. 3 *C. & P.* 583.

An apprentice being away after time on a Sunday, does not furnish a right of action against a surety who covenants that he shall not absent himself during business hours.

DECLARATION in covenant against a surety for the good behaviour, &c. of an apprentice. It appeared that it was stipulated that he should always be in on a Sunday evening by eight o'clock; notwithstanding this, on one Sunday evening, having been to see a friend, he did not return till twenty minutes past ten.

*Best*, C. J., held, That an absence for half an hour beyond the proper time on a Sunday evening would not, in his opinion, be an unlawful absenting within the meaning of the covenant, as against the defendant, who was a surety, because the words had reference to an absenting from business.

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*Ex parte* GROCOT, H. T. 1825. K. B. 5 *D. & R.* 610.

To obtain an apprentice's discharge by hab. cor., where impressed, it must appear that he consents; if that cannot be obtained, a Judge's warrant is the proper mode*.

ON motion for a habeas corpus to bring up an apprentice detained on board a ship for the purpose of serving in the navy. The application was made at the instance of the master.

*Per Cur.*—We never grant a habeas corpus where the party does not say that he is detained against his own consent. You must apply to a Judge at chambers for a warrant, at the instance of the master.

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(*b*) LIABILITIES OF MASTER.

HUGHES *v.* HUMPHREYS, E. T. 1827. K. B. 6 *B. & C.* 680; S. C. 9 *D. & R.* 715.

If an apprentice does that which

To an action of covenant by a father for not receiving and clothing his son, an apprentice; a plea:—That, after the indenture, defendants did receive, &c., until the apprentice ran away, and never

* See 2 Peters. Ab. 34.

returned. Replication:—That, after the apprentice so ran away, to wit, on a certain day, the defendants refused to receive him back then or at any other time, and thereby discharged him from their service and employ. Rejoinder:—That, before such refusal, the party enlisted as a soldier, and was, during the whole time, incapacitated from serving defendants as such apprentice; and no request to take back, when he was ready and capable of returning into their service, nor any offer to return, &c. Surrejoinder:—That a little time after such enlisting, to wit, &c., defendants refused, then or ever, to take back the apprentice into their service, and thereby discharged him.

disqualifies him from serving his master, no action lies against the master for not taking him back*.

The Court held, that the surrejoinder was bad; and the plea, a good bar to the action, as the plea was not avoided by the subsequent pleadings of the plaintiff. Besides, the apprentice had, by his conduct, done that which disqualified him from serving his master.

## IV. RIGHTS OF APPRENTICES, AS TO RETURN OF PREMIUM, UNDER 6 GEO. 4, c. 16, s. 49†. And see 3 *Peters. Ab.* 628.

## V. PLEADINGS IN ACTIONS CONNECTED WITH.

WEATHERBY *v.* GORING, M. T. 1824. K. B. 3 *B. & C.* 552.

In an action on an apprentice-deed, the venue cannot be changed until after issue joined.

IN an action of covenant on an apprentice-deed, application was made to change the venue. That motion was opposed, on the ground that there should be an affidavit of merits.

And *per Cur.*—The application is too early: it cannot be made until after issue joined; because, we cannot tell whether the defendant intends to defend the action or not; or whether any witnesses are to be examined or not.

See post, tit. *Venue.*

* But where a tradesman took an apprentice, with whom he received a premium, and covenanted to instruct and maintain him, in an action on that covenant the master pleaded that the apprentice refused to obey his orders, and left his house, saying that he would not return again. To which it was replied, that, afterwards, the apprentice returned and offered to obey his commands, but the master refused to receive him. Held, that, if the apprentice had, under these circumstances, stopped away an unreasonable time, (which ought to have been stated in a rejoinder), the master would have been justified in not receiving him; but that he was not at liberty to turn him away, or refuse to admit his apprentice into his house, for misconduct and absenting himself for a few days, but should have sued on his covenant. (*Winstone* v. *Linn*, 1 B. & C. 460; S. C. 2 D. & R. 465).

† This section enacts, that where any person shall be an apprentice to a bankrupt at the time of issuing of the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indenture or indentures whereby such apprentice was bound to such bankrupt. And if any sum shall have been really and bonâ fide paid, by or on behalf of such apprentice, to the bankrupt as an apprentice-fee, it shall be lawful for the commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had, in estimating such sum, to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the commission. The clause is imperative. An apprentice serving under an agreement that indentures should be executed, which, from inadvertence, are not executed before the bankruptcy, is within the act. (*Ex parte Haynes*, 2 G. & J. 122.)

WRIGHT *v.* GIHON, H. T. 1829. N. P. 3 *C. & P.* 583.

Condonation by a master must be specially pleaded.

AN apprentice having received permission to be absent, stayed away, on one occasion, three or four days, and, on another, a week, beyond the time allowed; but after this, on the application of his friends, the plaintiff received him back. In an action against the surety, *Best*, C. J., held, that the master's conduct, afterwards, amounted to a condonation of the offence, by taking him back. But, still, that must be specially pleaded.

## VI. DISSOLUTION OF APPRENTICESHIP*.

## VII. OF PARISH APPRENTICES.

### (*a*) WHO MAY BE BOUND.

REX *v.* ST. GEORGE, EXETER, T. T. 1825. K. B. 3 *Ad. & E.* 373; S. C. 5 *N. & M.* 61.

A parish apprentice may be bound without his consent;

IN this case, Lord *Denman*, C. J., said, as to parish apprentices, that the consent of the child was not requisite; and there is no reason to apprehend that a child would be taken away from its parents, because the whole matter is under the superintendence of the justices, who cannot be supposed likely to sanction such an arbitrary proceeding.

REX *v.* HIPSWELL, T. T. 1828. K. B. 8 *B. & C.* 466.

but an infant under eight years cannot be bound, under the 28 Geo. 3, to a chimney-sweep.

THE statute 28 Geo. 3, c. 48, s. 4, makes void all indentures whereby children under eight years of age are bound apprentices to chimney-sweepers. The apprentice in this case was bound at the age of five years.

*Per Cur.*—The words of the statute are, "That every person who shall from henceforth have, take, employ, retain, or keep any such boy as or in the nature of an apprentice or servant, employed in the capacity of a climbing-boy or chimney-sweeper, as aforesaid, who shall be under the age of eight years, as aforesaid, contrary to the tenor and true meaning of this act, and being convicted thereof, as hereinafter mentioned, shall forfeit and pay, for every such apprentice or servant so by him or her had, taken, &c., any sum not exceeding 10*l.*, nor less than 5*l.*" But the question is, is the indenture void? It is said, that void is sometimes construed voidable; and where the provision is introduced for the benefit of the parties only, such a construction may be right; but where it is introduced for public purposes, and to protect those who are incapable of protecting themselves, it should receive its full force and effect. We think it would be contrary to the spirit of the act to consider the indenture voidable only.

* May be by death; by consent; by misconduct; by coming of age; by award of justices; by bankruptcy, or insolvency. (See 2 Peters. Ab. from pp. 45—55). It seems that a parish apprentice under age is capable of assenting to the cancellation of his indentures. (*Rex* v. *Guinear*, 3 N. & M. 297; 1 Ad. & E. 152; Ab. post, tit. *Settlement.*

REX *v.* ST. GEORGE, EXETER, E. T. 1835. K. B. 3 *Ad. & E.* 373; S. C. 5 *N. & M.* 61.

Where parents reside in one parish, and the child in another, under 43 Eliz. and prior to 56 Geo. 3*, it was held, he might be bound by the parish officers, with the assent of two justices.

AT the date of the indenture of apprenticeship, J. L., who was then twelve years old, had been resident with his uncle in the parish of A. upwards of a year; his father was at sea, and his mother, with several children, was resident at B., the place of her husband's settlement, and receiving parish relief. The indenture was executed by the uncle, and allowed by two magistrates of A., and signed; but it was not executed by J. L.; J. L. resided with his uncle, and served him for some months after he was of age. A question arose, whether the parish officers had power, under the 43 Eliz. s. 5, to bind out any child not at that time resident in the parish.

*Per Cur.*—Since the law of settlement has been introduced, all the children of a pauper are considered as part of his family; and the officers of any parish where the pauper is settled and residing, and unable to maintain his children, may bind out such children, with the assent of two justices, and in the proper form, without the formality of having them, if resident at a distance, brought home to his family.

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### (*b*) WHO MAY TAKE.

REX *v.* GRAVESEND, H. T. 1832. K. B. 3 *B. & Ad.* 240.

Under the 10 Geo. 2, a man cannot take an apprentice upon an understanding that the apprentice is to live at the house of A., a waterman, who is to instruct him during the indenture.

THE 10th Geo. 2, c. 31, prohibiting a waterman or his widow from taking an apprentice, unless he or she were the occupier of a house to lodge the apprentice, and also the taking of more than two apprentices by such party, under certain penalties. A pauper bound himself, by indenture of apprenticeship, to serve the widow of a waterman, she not having such house, &c.; but, it being understood that he was to live at the house of a freeman of the company, which he did, to serve him conformably to the indenture, he having two other apprentices at the time.

The Court held the indenture void.

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REX *v.* INHABITANTS OF WITNEY, T. T. 1836. K. B. 5 *Ad. & E.* 191.

Where county justices have a concurrent jurisdiction with district justices, the former may consent to a binding of a district pauper in the county.

UNDER the 56 Geo. 3, c. 139, and 3 & 4 Will. 4, c. 63, a district had justices of its own, who exercised no jurisdiction in any other part of the county; the county justices, however, had a concurrent jurisdiction with the district justices. A pauper was bound apprentice by the officers of the district to serve in the county, but not in the district; and the allowance was made by two of the county justices, and not the district justices.

*Per Cur.*—Certainly there are two sorts of persons who are justices in the city of Oxford; namely, the county justices, who have jurisdiction in the city, and the city justices, who have jurisdiction in the city only. It does not follow that, because the city justices have no jurisdiction without the city, the county justices have no jurisdiction within it.

* Cap. 134. (See 1 Peters. Ab. 80).

(*c*) WHO MAY BIND, BY WHAT DESCRIPTION.

REX *v.* HAUGHLEY, E. T. 1833. K. B. 1 *N. & M.* 525.

An authority, under statute, to bind out paupers, by the name of "Guardians of the Poor," should not be executed "as Directors."

BY the 18 Geo. 3, a local act incorporated certain persons by the name of "The Guardians of the Poor within the hundred of Stow, in the county of Suffolk." There was a power to the body at large to elect directors and acting guardians for putting the powers of the act in execution. The directors and acting guardians were empowered to bind out poor children. The guardians of the poor executed a deed of apprenticeship, as "directors and acting guardians," and affixed the corporate seal.

The Court held:—This indenture was not valid. It is set up as the deed of the corporation, whose legal existence is known only by the name by which it was created—"The Guardians of the Poor within the hundred of Stow, in the county of Suffolk." But the indenture professes to be the deed of only a part of that corporation, by the name of "The Directors and acting Guardians."

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(*d*) OF THE INDENTURE.—As to the *Stamp*, see ante, p. 256.

REX *v.* BAILDON, E. T. 1832. K. B. 3 *B. & Ad.* 427.

The true consideration must be stated in the indenture.

THE mother of the apprentice, before the binding, agreed with the master to give him 1*l.*, in addition to the 4*l.* to be paid by the trustees of a charity; she was a consenting party to the indenture, in which only the 4*l.* was stated as the consideration.

The Court held, that the 8 Anne, c. 9, being intended to secure the insertion of the whole sum paid or contracted for with or in relation to the apprentice, the indenture was void.

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REX *v.* LONGNOR, E. T. 1833. K. B. 4 *B. & Ad.* 647; S. C. 1 *N. & M.* 576.

It may be executed for an illiterate person by his agent.

INDENTURES of a pauper. Neither the apprentice nor his father could write. They requested A. B. to write their names opposite to two of the seals at the bottom of the paper: this was done in the presence of the pauper and his father. At this time the indenture was not read over, nor was anything whatever said or done by the pauper or by his father, except the signing, before mentioned, by A. B. The indenture was immediately taken by the pauper to his master, and left with him, and the master then signed his name opposite to the third seal. The evidence shewed that the apprentice considered himself bound.

*Per Cur.*—There was a sufficient execution by father and son.

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REX *v.* ST. GREGORY, M. T. 1834. K. B. 2 *Ad. & E.* 99.

Where an apprentice is bound beyond the time limited by a statute, the indenture is voidable, not void.

BY a local statute, (1 Geo. 2, c. 20), certain guardians of the poor should have power to bind children "apprentices," provided such children be not bound for a longer term than until they shall have attained the respective ages following: viz., a boy the age of twenty-two, and a girl that of twenty. A boy, of the age of fifteen years, being apprenticed for the full term of seven years, a question arose whether it was legal.

*Per Cur.*—The act of parliament here neither declares that the binding shall be null and void, nor contains any words to render it illegal; nor is public policy in any way concerned in the binding being set aside. Then, the decisions, where indentures have been held voidable, only apply to the present case.

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(*e*) OF THE CONSENT OF JUSTICES, AND AS TO CHILDREN UNDER THE CONTROL OF POOR LAW COMMISSIONERS*.

REX *v.* MILLS, T. T. 1831. K. B. 2 *B. & Ad.* 578.

Where justices have a power to consent, they have also a discretion as to the propriety of the binding;

ON the construction of the 56 Geo. 3, c. 139, s. 2, which directs that a parish indenture shall be allowed by two justices of the county into which the apprentice is to be bound—

The Court held, that it gave those justices a discretion to determine on the propriety of the binding generally, and not merely with regard to the fitness respectively of the master and apprentice.

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REX *v.* ST. JOHN BIDWARDINE, E. T. 1833. K. B. 2 *N. & M.* 86; S. C. 5 *B. & Ad.* 169.

but where the pauper is an

A PAUPER of the age of twenty-four years put himself apprentice by deed. The question was, whether a person apprenticed

* By the 4 & 5 Will. 4, c. 76, (the new Poor Law Act), s. 15, it is enacted, "That from and after the passing of this act, the administration of relief to the poor throughout England and Wales, according to the existing laws, or such laws as shall be in force for the time being, shall be subject to the direction and control of the said commissioners; and for executing the powers given to them by this act, the said commissioners shall and are hereby authorized and required, from time to time as they shall see occasion, to make and issue all such rules, orders, and regulations for the management of the poor, for the government of workhouses, and the education of the children therein, and for the management of parish poor children, under the provisions of an act made and passed in the seventh year of the reign of his late Majesty King George the Third, intituled 'An Act for the better regulation of Parish poor Children,' of the several parishes therein mentioned within the bills of mortality, and the superintending, inspecting, and regulating of the houses wherein such poor children are kept and maintained, and for the apprenticing the children of poor persons, and for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor; and the keeping, examining, auditing, and allowing of accounts, and making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor, and for carrying this act into execution in all other respects as they shall think proper; and the said commissioners may, at their discretion, from time to time suspend, alter, or rescind such rules, orders, and regulations, or any of them: provided always, that nothing in this act contained shall be construed as enabling the said commissioners, or any of them, to interfere in any individual case for the purpose of ordering relief." By section 61, it is enacted, "That from and after the period at which any rule, order, or regulation of the said commissioners shall come into operation for the binding of poor children apprentices, in addition to such assent or consent, order or allowance of justices, as are now required by law, such justices, or any one justice, are and is hereby authorized and required to examine and ascertain whether the rules, orders, or regulations of the said commissioners then in force for the binding of poor children apprentices have been complied with, and to certify the same at the foot of every such contract or indenture, and of counterpart thereof, in such form and manner as the said commissioners, by such rules, orders, or regulations, may direct; and, until so certified, no such contract or indenture of apprenticeship shall be valid; provided, nevertheless, that nothing in this act, or in any rule, order, or regulation of the said commissioners, shall affect the jurisdiction of any justices of the peace over any master or apprentice during the period of apprenticeship."

adult, justices' consent need not be obtained.

under such circumstances was a poor child within the meaning of the 56 Geo. 3, c. 139, s. 11.

The Court thought it impossible to consider a person who was twenty-one years of age a child within the meaning of the act in question, as it would be incomprehensible to say that a person seventy years of age could be considered as such a child. Such an interpretation might be extended to any period of life.

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REX *v.* HALESWORTH, T. T. 1832. K. B. 3 *B. & Ad.* 717.

Nor to an apprenticeship, under a devise leaving the rents of certain lands as premiums to put out poor boys;

CERTAIN lands were devised—half of the rents to be applied for the relief of widows, and the other half in binding out apprentices; and accounts were kept of the funds, by churchwardens, distinct from the poor-rates; other lands were also devised to the churchwardens and overseers, to be applied in educating poor boys, and also apprenticing a certain number, to be chosen by the churchwardens, overseers, and principal inhabitants.

The Court held, that neither of the funds was to be deemed "public parochial funds," within the 56 Geo. 3, c. 139, s. 11, avoiding the indentures for want of the approval of justices.

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REX *v.* INHABITANTS OF QUAINTON, E. T. 1834. K. B. 3 *N. & M.* 289; 1 *Ad. & E.* 133; S. C.

or is the giving of a suit of clothes, by the parish officers, such an expense in the 56 Geo. 3*, as requires the assent of two justices to the indenture.

A PAUPER was bound apprentice, and the premium was paid out of a charity fund, and no other premium or consideration was paid to the master from any other source; but, on the day before the binding, he was provided with a full suit of clothes by the parish officers.

The Court held, that this was not within the statute; and that, in order to bring a deed of apprenticeship within 56 Geo. 3, c. 139, which requires the assent of two justices, the parish officers must be either directly or indirectly parties to the binding.

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REX *v.* MATTISHALL, M. T. 1828. K. B. 3 *M. & R.* 386.

Semble, contra, where an overseer advances money for the purpose of providing clothes.

AN infant pauper went on trial to M. for a month; at the end of that time he was apprenticed, and served under that indenture for three years, living all that time with M. M., before the indenture was executed, said the pauper should have some better clothes; and the pauper thereupon applied to the parish officers of M. The parish officers agreed to give him 2*l.*, at the execution of the indentures, to buy clothes, and 2*l.* more, for the same purpose, at the end of the year. They gave the first 2*l.* to the pauper's mistress, who laid it out for him in the purchase of clothes. At the end of the year, the other 2*l.* were paid to the pauper. It was contended, that the indenture was void, for want of the consent of two justices, under the 56 Geo. 3, c. 139, which enacts, that, after the 1st day

* Cap. 139, s. 11, after reciting that the salutary provisions of 43 Eliz. c. 5, were frequently evaded in the binding out of poor children, and the premium of apprentices, or a part thereof, was clandestinely provided by parish officers, who were thus enabled to bind out such poor children without the sanction of justices of the peace, it was enacted, that no indenture of apprenticeship, by reason of which any expense whatever should at any time be incurred by the public parochial funds, should be valid and effectual, unless approved of by two justices of the peace under their hands and seals, according to the provisions of the former act and of that act.

of October, 1816, no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid or effectual, unless approved of by two justices of the peace under their hands and seals. And of that opinion were the Court, who held—That the money must be considered as advanced out of the parochial funds, and therefore within the statute.

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REX *v.* COUNTESTHORPE, T. T. 1831. K. B. 2 *B. & Ad.* 487.

The consent of justices in the margin of the indenture, "as justices of the county aforesaid," is sufficient.

BY a parish indenture, which purported to be made between the churchwarden and overseers of the parish of D., in the county of N., of the one part, and A. B., of Countesthorpe, in the county of L., of the other part; it was witnessed that the said churchwarden and overseers of the parish of D., with the consent of two of his Majesty's justices of the peace for the said county, dwelling in or near the said parish, had bound, &c. The justices, in their written consent in the margin of the indenture, described themselves as justices of the county aforesaid.

The Court held, that the words, "county aforesaid," had the same meaning as the words "said county," in the body of the indenture; and that it sufficiently appeared, by the reference to the latter words, that they were consenting justices of the county of N.

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(*f*) ASSIGNMENT OF*.—As to the *Stamp*, see ante, p. 259.

REX *v.* SPREYTON, T. T. 1832. K. B. 3 *B. & Ad.* 818.

Although a master may delegate the assignment of an apprentice, still the agent must have an express authority.

THE master of a parish apprentice resided permanently abroad. His steward, having the general management of his estate, executed, in the master's name, an assignment of such apprentice, and charged the expenses in his accounts, which were subsequently allowed by the master; but the master had given no previous direction on the subject.

The Court held, that, supposing a master might delegate his power of assigning, yet that there must be an express authority for it; and the steward having no previous authority to assign, it was irregular.

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REX *v.* INHABITANTS OF EXMINSTER, E. T. 1837. K. B. 6 *Ad. & E.* 598.

An indorsement of acceptance of an assigned apprentice though misnamed in the assignment, is sufficient; and, if from one parish to another, no notice need be given to the overseers.

A PARISH apprentice, named Elizabeth Matthews, was assigned by her master, Thomas Melhuish; and an acceptance, by her new master, of the said Elizabeth Melhuish, was indorsed on the assignment, pursuant to the 32 Geo. 3, c. 57. Two questions arose: 1st, whether the mere indorsement, on the assignment of Elizabeth Melhuish, instead of Matthews, was sufficient. And, 2nd, whether, where a parish apprentice is assigned from one parish to a master in another parish, it is necessary to give notice of such assignment to the overseers of the latter parish, according to the 56 Geo. 3, c. 139.

*Per Cur.*—As to the 1st point, there is no doubt that the name

* See 56 Geo. 3, c. 139; 2 Peters. Ab. 93, n.

of "Melhuish" may be rejected; and the assignment is good. And, as to the second, although it might be desirable that the same notice should be given to the overseers in the case of an assignment as in that of a binding, we cannot make that addition to the statute.

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### (*g*) Discharge of, and return of premiums.

East *v.* Pell, H. T. 1839. Ex. 4 *M. & W.* 665.

Under 5 Eliz. c. 4, justices, on discharging an apprentice, cannot order a return of premium, or interdict its future payment.

To an action of covenant, setting out an indenture of apprenticeship of the 16th of August, 1834, by which one J. P., with the consent of his father, the defendant, put himself apprentice to the plaintiff to learn his art, &c. of a carpenter and joiner, and to serve him, from the date of the indenture, for the term of six years and eight calendar months; and that the plaintiff, in consideration of the sum of 15*l.* at or before the execution of the indenture to him paid by the defendant, and of the further sum of 15*l.* to be paid by the defendant to the plaintiff on the 16th December, 1837, in case the said J. P. should be then living and continuing with the said plaintiff, his said apprentice in the art, &c. should teach and instruct, finding unto the said apprentice sufficient meat, drink, lodging and other necessaries, during the term; for the performance of which covenants, &c. the parties bound themselves by the said indenture, &c. The declaration then averred, that J. P., on the day and year first aforesaid, entered and was received into the service of the plaintiff as an apprentice, and so continued until, upon, and after the said 16th December, 1837. Breach—that, although at the commencement of the suit the day last named had elapsed, defendant had not paid to plaintiff the sum agreed to be paid on that day, but had therein failed and made default, to the plaintiff's damage, &c.

The defendant pleaded, that the plaintiff ill-used J. P., and thereupon he applied to the Quarter Sessions, who, after hearing the case, did, pursuant to the statute in such case made and provided, duly testify, declare, and pronounce, by writing under their respective hands and seals, that the apprentice should be, and was thereby discharged by them, for cause of the said matters of complaint, from his said apprenticehood. And the Court and justices did thereby, according to the form of the statute, further order that no part of the premium of 15*l.* paid at the execution of the aforesaid indenture of apprenticeship should be repaid by the said plaintiff; and that no part of the said sum of 15*l.*, which became payable to the said plaintiff on the 16th December then last, should be paid by the defendant to the plaintiff. On demurrer—

*Per Cur.*—Though the justices have power, in writing, to pronounce and declare that they have discharged the apprentice, and state the cause for so doing, no inference arises from that, that they can also take from the master a premium he has received, or withhold from him any part of one that may be due; that is extending the statute very much, and is a claim by the justices to exercise a much larger power than the act confers. The one does not appear to us to be incidental to, but to go much beyond the other.

## VIII. PUBLIC CHARITY APPRENTICES*. See also *Stamp*, ante, p. 257.

### Rex *v.* Amersham, H. T. 1836. K. B. 6 *N. & M.* 12; S. C. 4 *Ad. & E.* 508.

The indenture must state the full consideration, even though a third party gives part unknown to the trustees of the charity.

In this case, it appeared that the trustees of a public charity bound out an apprentice to one R., for the consideration of 10*l.* to be paid by them to R., and a receipt was indorsed on the indenture for the 10*l.*, the full consideration-money within mentioned. The apprentice's grandfather had previously agreed with R. to pay a premium of 25*l.*, if she would take his granddaughter as an apprentice. After the execution of the above indenture, the apprentice's grandfather paid to R. 15*l.*, to make up the amount which he had agreed to pay. The trustees were entirely ignorant of this contract. On the question whether the indenture was void by the statute 8 Anne, c. 9, s. 39, the full sum received, &c. not being inserted in the indenture—

The Court said, that *Rex* v. *Baildon*, 3 B. & Ad. 427, decided that such an indenture, under similar circumstances to the present, was void; and they should adhere to that decision.

* By 7 Geo. 1, c. 3, s. 2, "All sums of money given by any person to be continually employed for the binding out apprentices, shall be employed in the following manner, unless ordered by the givers, viz. all corporations of cities, boroughs, and towns corporate, and in places not corporate, the parson or vicar, constables, churchwardens, collectors, and the overseers, or the most part of them, shall have the nomination and placing of such apprentices, and the guiding and employment of such monies; and if they shall not employ the same accordingly, every person offending shall forfeit 3*l.* 6*s.* 8*d.*, half to the poor, and half to him that shall sue by action of debt, bill, plaint, or information.

Sect. 3. "The master that shall receive the money shall be bound, with one or two sureties, in double the sum unto such corporation, or to the other persons appointed by this act in places not corporate to take the ordering of it, on condition to repay it at the end of seven years, or within three months thereof; and if the apprentice shall happen to die within the seven years, then within one year after such death; and if the master shall die within the seven years, then within one year after such master's death.

Sect. 4. "The said money shall always be put forth in three months after it shall come to the said parties' hands; and if there be not three fit persons to be bound apprentices within the places where the money is given to be employed, it shall be disposed of for binding some of the poorest children of any adjoining parish after the same manner.

Sect. 5. "And choice shall always be made of the poorest children, and on such apprentice as shall be above fifteen years of age when bound.

Sect. 6. "The said persons in places not corporate shall yearly, within a month after Easter, account before four, three, or two justices for the said monies, and, within ten days after such accounting, yield up the monies and bonds remaining in their hands.

Sect. 7. "And if any of the trustees shall break their trust, or commit any offence for which no penalty is given by this act, any person may petition the Lord Chancellor, who may issue a commission to hear and determine the same, and may levy the money misemployed upon such defaulters, or, otherwise, upon such able inhabitants of the place as they shall think fittest; and persons aggrieved may appeal to the Lord Chancellor."

# Appropriation*.—*Limitations, Stat. of.*

See tits. *Attorney—Banker—Debtor and Creditor—Payment.*

GASKELL *v.* GASKELL, T. T. 1828. Ex. 2 *Y. & J.* 502.

To constitute an appropriation, the entire control over the fund must be parted with,

A TESTATOR, in his lifetime, having certain funds standing to his credit at his banker's, by letter directed them to carry some parts of such funds to the account of certain persons, as trustees for his wife, and, after her decease, for his son; and other parts thereof to the account of certain persons, as trustees for his son; and such sums were accordingly carried by the bankers to the account of such persons in their books; and the dividends were, from time to time, carried to the same account. But the testator never communicated the fact to the trustees; and there was some evidence that

* 1st, *In general,* The party who pays money has a right to direct the application of it; but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, the former may apply the money paid to which of those demands he pleases. (*Hall* v. *Wood*, 14 East, 243, n.; *Clayton's case*, 1 Merivale, 572). But there may be a special application made, arising out of the nature of the transaction, though not expressed at the time, in terms, by the party making the payment; (Id.; and *Wilson* v. *Hirst*, 1 N. & M. 746; *Chitty* v. *Naish*, 2 D. P. C. 511; *Brazier* v. *Bryant*, Id. 477); and, under such circumstances, the money shall be applied to one or other account, according to the presumed intention of the parties, to be collected from all the facts. (Id.)

Where there was a running cash and bill account between the bankrupt and a banking company, who were under considerable advances to him, but part of these advances arose out of illegal transactions, and the bankrupt, from time to time, deposited and made payments, without any specific appropriation, or any settled account between him and the bankers:—Held, that the payments must be appropriated in reduction of the earlier items of the account, and of the legal, and not the illegal part of the demand. (*Ex parte Rundleston*, 2 Deac. & Chit. 534).

The plaintiffs (bankers) had an account with D. & Co., and paid D. & Co. large sums of money, on credit, before the 11th of March, 1829. On the 11th of March, 1829, the plaintiffs executed an indemnity-bond to the plaintiffs, which recited that the plaintiffs were then about to enter into and have large dealings and transactions with D. & Co., in the course of which D. & Co. would require advances, &c.; and that defendant had agreed to secure and indemnify the plaintiffs against the same; and the condition of the bond was, that if the defendant should indemnify and save harmless the plaintiffs from and against all and all manner of engagements, debts, and lawful claims not exceeding 10,000*l.*, which the said D. & Co. might legally make, contract, or come under to and with the said plaintiffs, in the course of the said dealings and transactions, from the date of the bond till the 11th of March, 1831; or, if at the close of such dealings and transactions, within the period aforesaid, there should be a balance due to the said plaintiffs from D. & Co. not exceeding 10,000*l.*, and that the defendant should pay the said balance, then the obligation to be void:—Held, that, as between plaintiffs and the defendant, the former had no right to appropriate to the old account of D. & Co. sums of money paid in, generally, by D. & Co. subsequent to the date of the bond; but that these payments should go in liquidation of advances made after that date. (*Parr* v. *Howlin*, 1 Alcock & Napier, 196).

If a creditor receive dividends upon a debt partly secured by guarantee of a third person, the dividends must not be appropriated to the excess of the debt upon the sum guaranteed, but must be applied rateably to the whole debt; and the surety is relieved from liability by the amount of dividend on the first, which is secured. (*Raikes* v. *Todd*, 8 Ad. & E. 846. See also tit. *Guarantee*).

In a case of false representation, where the transactions between the creditor and debtor are continued beyond a period, where the person giving such false representation continues to be liable on account of them, but without a settlement of the balance up to that period, and money be afterwards paid generally by the debtor to the creditor, he may apply such payments to the account of the subse-

the testator had directed the transfers, under an impression that he should be able by that means to evade the legacy duty; and that he had shewn an intention to exercise some acts of ownership over the fund.

The Court held, that such appropriations were void, the testator having retained a power over them.

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BUCHANAN *v.* FINDLAY, T. T. 1829. K. B. 9 *B. & C.* 738.

IN an action for money had and received to the use of the plaintiffs, as assignees of A. & Co., being the proceeds of a bill remitted to the defendants, with orders to get it discounted, and apply the

and the object sought to be effected performed,

quent transactions; and the person giving the false representation shall still be liable for the balance due before the period when his liability ceased. (*Hutchinson* v. *Bell*, 1 Taunt. 558).

2. *Of Goods in hands of Agent.*—The defendants carried on business as a commission-house at Liverpool, and were connected with several houses abroad, in which they were partners, but the foreign partners were not partners in the Liverpool house. H. & J. were in the habit of consigning goods to the defendant to be sent abroad to their foreign houses for sale, and the proceeds were remitted to the defendants on account of H. & J. H. & J. being indebted to R. & Co., wrote the following letters to the defendants:—"We now authorize you to pay to Messrs. R. & Co., (having revoked the former order in their favour), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your following establishments to the present date, one-half of the remainder of the proceeds of said shipments, provided the same shall not exceed 5000*l.* H. & J." On which the defendants wrote to R. & Co., stating that they would pay the money accordingly, on receiving their guarantee, which R. & Co. thereupon gave. Before the proceeds were received by the defendants, H. & J. became bankrupts, and their assignee gave the defendants notice not to pay anything on account of the bankrupts:—Held, on the goods being afterwards received and sold by the defendants, that the proceeds were not recoverable by the assignees, as the letter of H. & J. contained a specific appropriation, or an equitable assignment to R. & Co., which was not revocable by the bankrupts or their assignees. (*Hutchinson* v. *Heyworth*, 1 Per. & D. 266).

3. *Appropriation of Funds to pay Legacies.*—Although legatees are not entitled in any case to receive their legacies before the day of payment arrives, yet they are entitled to apply to a Court of Equity, and pray that a sufficient sum be set apart to answer the legacy when it shall become due. (*Phipps* v. *Annesley*, 2 Atk., 58; 1 Bro. C. C. 105; 2 Id. 58; 3 Id. 144). This rule, however, is not applicable to legacies to be raised out of the real estate, (*Gawler* v. *Standerwick*, 2 Cox. 15); nor according to *Webber* v. *Webber*, (1 S. & S. 311). Where a legacy of a sum of money is given on a contingency, the Court will not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens, but will direct the whole residue to be paid over to the residuary legatee, on his giving *real security*.

When the appropriation is made under the direction of the Court, it should seem, according to the opinion of Lord Thurlow, in *Green* v. *Pigot*, 1 B. C. C. 105, that the legatee must bear any losses, and enjoy any additions which the fluctuation of the price of stock may cause. But in *Sitwell* v. *Bernard*, 6 Ves. 543, Lord Eldon said, that there had been other cases since *Green* v. *Pigot*, in which it had been held, not to be the legitimate effect of appropriation to give a larger interest than if there had been no appropriation. However, in the subsequent case of *Burgess* v. *Robinson*, 3 Meriv. 9, where there had been an investment of 500*l.* in stock, in pursuance of an order made on the application of a trustee, without the consent of the plaintiff, who was entitled thereto, Sir William Grant held, that the investment of the money was an appropriation, by which all parties were bound, and therefore that the plaintiff was entitled to the stock, and all the benefit accrued from the rise thereof. (4 Mad. 254).

Where the existence and amount of a testator's debt are contingent, and depend upon the result of legal proceedings before a foreign tribunal, which are not likely to be speedily settled, the Court of Chancery, in administering his assets, will not be induced, by that circumstance, to direct an appropriation of the fund in Court to answer pecuniary legacies, subject to such demands as creditors may eventually establish. (1 Russ. & M. 729).

proceeds in a specific way, but before they became due, A. & Co. became bankrupt, and required to have the bill returned, it not having been discounted, but the defendants received the amount when due,—

The Court held, that as the bills were sent to the defendants that they might procure them to be discounted without delay, and make an immediate application of the proceeds according to the directions contained in the letter in which the bills were sent to them, they did not procure them to be discounted, and as soon as the bankrupts knew that this was not done, they required the defendants to return the bills. The bankrupts had a right to make this demand. If goods or bills are deposited for a specific object, and the bailee will not perform the object, he must return them. The property of the bailor is not divested or transferred until the object is performed.

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CROWFOOT *v.* GURNEY, M. T. 1832. C. P. 9 *Bing.* 372; S. C. 2 *M. & Scott*, 473.

or contingency ascertained;

A. BEING indebted to B., and an unascertained balance being due from C. to A., A., by letter, requested C. to pay such balance to B. C., by letter, consented to do so, on the amount being ascertained; after the amount was determined, but before it was paid to B., A. became a bankrupt.

The Court held, that the above circumstances amounted to an equitable assignment to B. of the debt due from C. to A., and that the assignees under the commission against A., standing in the same situation as the bankrupt himself, could not maintain an action against C. for the amount, although it has been objected that such an assignment could not take place except in respect of a precise and ascertained amount.

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HODGSON *v.* ANDERSON, H. T. 1825. K. B. 3 *B. & C.* 842; S. C. 5 *D. & R.* 735.—S. P. WELDLAKE *v.* HURLEY, T. T. 1830. Ex. 1 *C. & J.* 83.

and the consent of the third party, holding the money, obtained;*

THE plaintiff being indebted to the S. bank, as the drawer of a bill, offered to assign to them a debt due from the defendant, a foreign merchant, to him, which was acceded to, and shortly afterwards sent them an order on the defendant's agents, directing them, as soon as they should have received funds of the defendant's, to pay the bank, and that he would credit the defendant for the amount. Having received his order to that effect, the order was communicated to the defendant's agents, who verbally promised to pay the bank according to the terms, when they should have received funds. The plaintiff afterwards authorized H. to collect the money and remit it to L. & Co., and the defendant entered into an obligation to pay, at a particular time; but in such obligation it was stated, that a payment had been made on account of the debt by some person to the plaintiff on account of the defendant, and it was stipulated that if such had been the case it should be deducted. L. & Co. afterwards demanded the amount from defendant, and gave

* As well as the party to whom it is to be paid. (*Owen* v. *Bowen*, M. T. 1829, N. P., 4 C. & P. 93).

him notice not to pay to the bank the debt due from him to the plaintiff; the defendant's agents, however, afterwards paid the debt due to the bank under an indemnity. In an action by the plaintiff for the balance of account on a plea of set-off, it was held, that there being an order by the plaintiff, and a verbal promise by the defendant's agents, and if not an express assent by the defendant, yet sufficient evidence from whence it might be implied, there was a legal obligation on the defendant's agents to pay the debt to the bank as soon as funds came to their hands, and that therefore the payment was good, and binding on the plaintiff.

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HUTCHINSON *v.* HEYWORTH, M. T. 1838. K. B. 1 *P. & D.* 266.

Which is not revoked by the bankruptcy of the party requesting the money to be paid. And the authority ordering the payment in a letter need not be stamped.

H. & Co., at Liverpool, were commission agents for H. & J., manufacturers at Rochdale, received their goods and sent them to their foreign establishments abroad, for sale. On the 30th of September, 1831, goods to a large amount had been sent abroad, and H. & J. were greatly indebted to H. & Co. for advances, in anticipation of sales abroad. They were also indebted to R. & Co., their bankers, at Rochdale; and, on the 23rd of September, gave a written order to H. & Co. to pay R. & Co., after deducting their own advances, one half of the remainder of the proceeds. H. & Co. wrote to inform R. & Co. of this order, stating that the amount would probably be 4700*l.*, and offering to comply therewith, on receiving a guarantee against other claims. H. & J. did not forward this letter, but wrote back, on the 28th of September, a letter, which concluded as follows:—"We now authorize you to pay to Messrs. R. & Co., (having revoked the former order in their favour), after you have paid yourselves the balance we owe you, from the nett proceeds of our shipments to your foreign establishments, to the present date, one half the remainder of the proceeds of the said shipments, provided the same shall not exceed the sum of 5000*l.* H. & J." H. & Co. sent to R. & Co. information of this order, and an offer to comply with it upon receiving a guarantee as before, which guarantee was given by R. & Co. H., who survived his partner, subsequently became bankrupt, and his assignees gave notice to H. & Co. not to pay the money over to R. & Co. They disregarded this notice, and paid the sum of 5000*l.* to them. Held, first, that the letter of the 28th of September was not a bill of exchange, and did not require a bill-stamp; secondly, that there was an appropriation of the funds which was not revoked by the bankruptcy.

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FIELD *v.* CARR, T. T. 1828. C. P. 5 *Bing.* 13; S. C. 2 *M. & P.* 46.

An appropriation may be effected by the act of setting items in an account against each other, one on the debit side, the other

IN 1823 T. C. drew upon the defendant two bills of exchange, which he afterwards indorsed and paid in generally to his account with the plaintiffs, his bankers, who credited him for their amount. The bills being dishonoured, the plaintiffs debited them in the account of T. C., and the latter subsequently paid in (generally on account) various sums, more than sufficient to balance all items in the account, to the time of the return of the bills. The defendant paid the amount of the bills to T. C., but did not require them to

on the credit side of an account*.

be given up to him. In 1826 T. C. became bankrupt, at which time a large sum was due from him to the plaintiffs, for which they proved, but took no notice or made no exhibit of the defendant's acceptances; neither did they make any demand on the defendant in respect of them until twelve months after the date of T. C.'s commission, when they sued him for their amount.

The Court said, it certainly seems most consistent with reason, that where payments are made upon one entire account, such payments should be considered as payments in discharge of the earlier items; and Mr. Justice Abbott said, the master of the rolls says, in such a case, (that is, a banking account), there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. *The appropriation is made by the very act of setting the two items against each other.* Upon that principle all accounts current are settled, and particularly cash accounts. Pursuing that course in the present case, the bills which form the ground of this action must be deemed to have been satisfied.

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CROOKSHANK *v.* ROSE, T. T. 1831. N. P. 5 *C. & P.* 19; S. C. *M. & Rob.* 100.—S. P. PHILPOTT *v.* JONES, M. T. 1834. K. B. 4 *N. & M.* 14; S. C. 2 *A. & E.* 41.

And if a party having a demand, part legal and part illegal, receives money, he may apply it to which claim he pleases†.

IN assumpsit, it appeared that a publican took, from a person who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, sold in less quantities than 20*s.*, but not to the amount of either the bill or note. Money had been paid on account.

Lord *Tenterden*, C. J., was of opinion that the plaintiff might, notwithstanding the 24 Geo. 2, c. 4, s. 12, apply the payments to the account of the spirits.

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BIGGS *v.* DWIGHT, M. T. 1827. K. B. 1 *M. & R.* 308.

As, where he holds two bills, one properly stamped, another improperly, he may apply it to the latter bill;

THE defendant being indebted, as acceptor of two bills, one for 25*l.* and another for 50*l.*, both outstanding, paid 22*l.* 10*s.* on account, to the plaintiff, the holder, who wished to have the whole of the former bill paid; but the defendant replying, that he had no more then, but would pay some more soon, the holder then indorsed on the 25*l.* bill, "received in part of two bills the sum of 22*l.* 10*s.*;" it appearing that such bill was void for want of a proper stamp. The jury found for the plaintiff. Motion to set it aside, on the ground that the 22*l.* 10*s.* not having been specifically paid on account of the void bill, but of both bills generally, it could not be

* In *Simson* v. *Ingham*, 2 B. & C. 65, it was held, that the creditor need not apply it to any particular demand at the moment of payment, but has a right to make the application at a subsequent period; nor will an entry in his books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand.

† But, in *Wright* v. *Laing*, 3 B. & C. 165, it was decided, that where there are two demands, one legal and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand.

applied in the subsequent taking of the account to any but the good bill.

*Per Cur.*—The defendant, when he made the payment, considered himself as liable on the bill, and we think the evidence was sufficient to shew a specific appropriation by him of the money he paid at the time. The plaintiff wished the whole of the 25*l.* bill to be paid. The defendant said he had no more money at the time, but promised to pay some more soon. Nothing was then said about the larger bill. If, then, it had been the larger bill that was void, we think the defendant, upon this evidence, would have been entitled to treat this as an appropriation of the money to the smaller, which, in that case, would have been the good bill.

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WILLIAMS *v.* GRIFFITH, T. T. 1839. Ex. 5 *M. & W.* 300.

or to the part of a claim barred by the Statute of Limitations.

IN an action for the balance of a banking account, the question between the parties was, whether a disputed sum above six years old had been paid by the plaintiffs with the defendant's authority or not. It was, however, clearly proved, on the part of the plaintiffs, that the payment was expressly authorized by the defendant. It appeared also that the custom of the bank was to send to their customers half-yearly statements of their accounts; and it was sworn that such accounts had been regularly transmitted by post to the defendant, from 1826 to 1830. Copies of several of these accounts were put in, which shewed that in that interval the defendant had made general payments on account, much exceeding the item in question, although the actual balance was always against him. It was contended for the defendant, that, under the circumstances, the Statute of Limitations was a bar to the plaintiff's recovering this disputed item of 112*l.* The judge who tried the cause thought otherwise, and under his direction a verdict was found for the plaintiffs for the whole amount claimed.

The Court held, that according to the rule laid down in *Clayton's* case, (2 Meriv. 572), the defendant's payments, not having been specially appropriated by him, the plaintiffs had a right to apply them in discharge of any undisputed earlier items of their accounts.

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BRAZIER *v.* BRYANT, H. T. 1834. K. B. 2 *D. P. C.* 477.

And the same rule applies where there are two claims, one on a simple contract, and the other on a judgment;

THREE bills of costs had been delivered by C. & C., in 1829, to B., and to secure the payment of two of them, two warrants of attorney were given in the year 1830. On these warrants judgment was entered up, and execution issued, on the 10th of May, 1833. The payment of the third bill was not secured, but a sum of 75*l.* was paid by B., generally on account of debt and costs due to C. & C.

The Court held, that if a debtor pays money to his creditor without directions as to its appropriation, the creditor has a right to apply it in liquidation either of a judgment or simple contract debt.

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WOOLEY *v.* JENNINGS, M. T. 1825. N. P. 2 *C. & P.* 144.

or, where a creditor has a running subse-

A. OWED B. a sum of money, 4,000*l.*, and gave awarrant of attorney to confess judgment for that sum. Afterwards dealings and payments took place between them to an amount of 20,000*l.* on each

quent account, and an over-due warrant of attorney;

side of the account, but no payment was made specifically in discharge of the warrant of attorney.

*Per Abbott*, C. J.—The payments were made generally, and the receiver took them to the current account. There is no appropriation of the money by the debtor; he leaves it to the creditor to put it in reduction of either debt, and the creditor appropriates it to the running account.

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GODDARD *v.* HODGES, M. T. 1832. Ex. 1 *C. & M.* 33.

but a legal and not a subsequent equitable debt must be first satisfied under a general payment.

*Per Cur.*—If there be a legal debt, and a claim which would only become a legal debt, on a settlement of the partnership accounts, and a striking of a balance, we are bound to consider a general payment as applicable to the legal debt.

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CHITTY *v.* NAISH, E. T. 1834. B. C. 2 *D. P. C.* 511.

If no specific application of the money be made, the intention of the parties must be collected from all the facts.

N. EMPLOYED C., an attorney. The result was, that N. became indebted to C. in a considerable amount. To secure the payment of a portion of this, three warrants of attorney were given, and judgments entered up. Certain sums of money were paid by N. to C. on account, and a portion of it applied to satisfy the first and second judgments. With respect to the third, the difficulty arose as to the mode of applying certain sums in its satisfaction. A part had been realized under an execution, and for that part credit was given. An application was made on the part of N. that it should be referred to the master, to ascertain whether the three several judgments entered up by the plaintiff, before his bankruptcy, upon the warrants of attorney against the defendant, had been satisfied.

*Taunton*, J., said, there is no doubt that where a debtor pays money to his creditor generally, without any specific direction as to the debt, in discharge of which it is to be applied, the creditor will be at liberty to apply it in the discharge of any demand which he has upon the defendant. If the creditor, under such circumstances, make no specific application, the money shall be applied to one or other account, according to the presumed intention of the parties, to be collected from all the facts.

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SMITH *v.* WIGLEY and ANOTHER, E. T. 1833. C. P. 3 *M. & Scott*, 174.

A payment by a retired partner generally goes in liquidation of the joint debt*.

ASSUMPSIT against T. & W. On the trial, W.'s defence was, that a partnership existed between him and T. up to the 14th of January, 1831, upon which day it was dissolved, and of such dissolution the plaintiff had formal notice that defendant was not

* So, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firm in one entire account, the payments made from time to time by the surviving partners must be applied to the old debt. (*Simson* v. *Ingham*, 2 B. & C. 65; *Clayton's* case, 2 Meriv. 572; *Brooke* v. *Enderby*, 2 B. & B. 70). So, payments by a debtor to surviving partners, from time to time, upon one general account, including the old debt, are to be applied in the first place to such old debt; (*Bodenham* v. *Purchas.*, 2 B. & A. 39); but where the old debt is not brought into the new account, general payments on the new account are not to be considered as made in discharge of the old debt. (*Simson* v. *Ingham*, 2 B. & C. 65). And where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money

jointly liable with T. for any debt which the latter might have contracted after that period. The defendant admitted that 84*l.* were due to the plaintiff before the dissolution of the partnership, on the 14th of January, 1831; but he contended, that of this sum T. had at a subsequent period paid 75*l.* on the joint account of the firm, consequently the sum of 9*l.* paid into Court was the balance justly due. T., it appeared, continued to deal on his own account with the plaintiff, up to the 30th of June, 1831, at which time he was indebted to the plaintiff in the sum of 200*l.*

*Per Cur.*—This is the case of two separate accounts, one a joint partnership account down to the 14th of January, 1831, the other the individual account of T. alone, down to the 14th of July in the same year. Now, it is clear that T. was liable to both these accounts, as far as his solvency would permit. On the 19th of January, a few days after the dissolution of the partnership, he commences a series of payments, which, in the aggregate, amounted to 75*l.*, without making any specific appropriation of the sums thus paid; consequently, we think, that if a late partner makes remittances without any specific appropriation, such remittances go to the discharge of the partnership account.

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ELLIOTT *v.* PYBUS, E. T. 1834. C. P. 4 *M. & Scott*, 389.

An election to take and appropriate goods is established by shewing the vendee's promise to pay, and interference;

THE defendant agreed with plaintiff for the completion of a machine, and made two payments in advance. During the work he frequently saw the machine, and suggested various alterations; upon its completion, he saw and approved of the article, and requested time for the payment; finally, however, he refused to accept or to pay. Upon an action for goods bargained and sold,

The Court held, that the acts of the defendant amounted and were equivalent to an assent, and to an appropriation of the article by him; consequently, that the action was well brought, and that the plaintiff was entitled to recover.

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ALEXANDER *v.* GARDNER, E. T. 1835. C. P. 1 *Scott*, 630.

or by accepting the invoice and bill of lading.

THE plaintiff and defendant entered into a contract for the transmitting and receiving of certain butters, which were to be shipped in the month of October, free, on board, at a price specified, and to be paid for by bill at two months after date of arrival. The goods, however, were not shipped till the month of November, when the bill of lading and invoice were delivered to and accepted by the defendants. The vessel on board of which the butters were shipped was wrecked, and part of the butters were lost, and the remainder damaged. In indebitatus assumpsit, for goods bargained and sold, the jury found that the defendants had waived the performance of the condition, as to the shipment of the butters in October.

The Court held, that there was a sufficient appropriation and

paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual, (*Thompson* v. *Brown*, 1 M. & M. 40).

Where the party paying is indebted to the party receiving for a sum due from his wife, dum sole, and also on another demand, the party receiving may apply the money to the first demand, (*Goddard* v. *Cox*, 2 Stra. 1194).

When A. has a demand against B. as executor, and also another demand against him in his own right, and B. makes a general payment, A. cannot apply it to the former demand, (*Goddard* v. *Cox*, 2 Stra. 1194).

ascertainment of the goods and assent thereto by the defendants to vest the property in them, and consequently that the action was maintainable.

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MELLING *v.* KELSHAW, M. T. 1830. Ex. 1 *C. & J.* 184.

But where goods are already appropriated, a mere consent to give notice to a subsequent claimant does not amount to an appropriation, even though the first appropriation be abandoned.

THE defendant, a wharfinger, received from E. an order to deliver certain goods to H., which he accordingly transferred to his name. E. being greatly indebted to C. subsequently signed an order for delivery of the same goods, together with others, in favour of C. Upon receiving which, the defendant undertook to hold the latter goods for C.; but as to the others, refused, without an order from H.; at the same time giving C. an account of the quantity, and saying he would not deliver them without letting C. know. It appeared that the debt of E. to H. was never entirely paid, nor did H. ever give any order in favour of C.; but, with the view of obtaining the remainder of his debt, executed an order in favour of E.

The Court held, that nothing ever took place which was necessary to vest the property in C., and that consequently there was no appropriation.

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WALLER *v.* LACY, E. T. 1840. C. P. 8 *D. P. C.* 563.

An attorney who receives damages recovered by his client, cannot make a specific appropriation without the consent of his client.

THE plaintiff, an attorney, having received damages in an action recovered by his client, the question was, whether he had a right to appropriate them in liquidation of any part of his demand, without the knowledge or consent of his client?

*Per Cur.*—He has no such right. The doctrine of appropriation does not apply to a case of money received by the plaintiff without the knowledge of his client. It is not a case of debtor and creditor. The client must be consulted before the money can be appropriated.

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**Approbement.** See tit. *Common.*

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**Approver.** See *Witness.*

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**Appurtenances.** See tits. *Deed—Devise.*

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**Appurtenant.** See tit. *Common.*

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## Arbitration*.

(2 *Peters. Ab.* 97.)

See also tit. *Inclosure.*

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I. SUBJECT-MATTER OF REFERENCE, p. 281.

* A reference to arbitration is an agreement, or consent, whereby two or more contending parties submit a matter in dispute to an indifferent individual or individuals. It is either an agreement at common law, or under the

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6. *Infants*, p. 284.
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statutes 9 & 10 Will. 3, c. 15, and 3 & 4 Will. 4, c. 42, s. 39, 40, 41. Those at common law may be either by agreement, by parol, or instrument under seal, between the parties; or, if an action be pending, by rule of Court, or judge's order. Some modern acts, as those relating to *Friendly Societies*, (9 Geo. 4, c. 22), to *servants*, or *certain trades*, (5 Geo. 4, c. 96), and *Savings' Banks*, the 9 Geo. 4, c. 92, s. 45, see 8 Bing. 396, are *compulsory* on parties to refer their disputes to arbitration.

It is settled at common law, that unless the parties be bound by submission made a rule of Court, they may, if no arbitrators have been named, refuse to appoint them, although they have expressly covenanted to refer to arbitration, (1 Wils. 129; 8 T. Rep. 139; 6 Ves. 815); or may, at any time before an award has been made, countermand the arbitrator's authority, so as to render a subsequent award, after notice of the revocation, a nullity, (5 B. & Ald. 507; 2 Chit. Rep. 316; *sed vide* 3 & 4 Will. 4, c. 42, s. 39, *post*, 289); and the agreement to refer is no bar to an action at law or suit in equity, (2 B. & P. 131); and, although an action may certainly be supported for the breach of the agreement to refer, (2 B. & P. 131; see *Brown* v. *Tanner*, 1 M. & Y. 464, Ab. post), yet the damages therein might be merely nominal, and not equivalent to the sum that might have been awarded, unless indeed there has been a very explicit agreement, as is advisable, to pay a named sum equal to the sum claimed as stipulated damages, and not as a penalty; and, in general, a court of equity will not compel a specific performance of a covenant to refer.

V. OF THE PROCEEDINGS INCIDENT TO A REFERENCE, p. 302.

VI. OF THE AWARD.

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VII. UNDER FRIENDLY SOCIETY ACTS. See post, tit. *Friendly Society.*

VIII. DISPUTES BETWEEN SERVANTS IN TRADE AND MASTERS. See post, tit. *Master and Servant.*

IX. SAVINGS' BANKS. See post, tit. *Savings' Bank.*

## I. SUBJECT-MATTER OF REFERENCE*.

Thorp *v.* Cole, T. T. 1835. Ex. 2 *C. M. & R.* 367; S. C. 4 *D. P. C.* 457; S. C. *On Error*, 1 *M. & W.* 531.

A poor-rate cannot be the subject of a reference to arbitration†.

On assumpsit on an award, it appeared that the submission to arbitration recited that the plaintiff had been rated to the relief of the poor, and conceiving himself to be overrated, had given notice of appeal to the churchwardens and overseers, and other persons, who had proposed to defend the same; but that the appeal was not entered, in consequence of the plaintiff and the said churchwardens and overseers, as far as they lawfully might or could agree to abide by the award of the arbitrators concerning the said matters in difference, and of and concerning the costs of the agreement, and counterpart of the notice of appeal, and of the preparations to resist such appeal, and all matters relating thereto. The costs of the reference to be in the discretion of the arbitrators. The arbitrators awarded that the churchwardens and overseers should pay to the attorney for the plaintiff 16*l.* 12*s.*, his bill already delivered, and the amount of his costs attending the reference and procuring the assent of his clients to an enlargement of time; and directed them to deduct 10*s.* on all future rates, and refund 10*s.* on all past rates, paid while the then scheme was in operation. They then directed that, as a dispute was made with regard to the quantity of a lathe

* In general, all matters for which an action at law will lie, or a suit in equity supported, may be referred to arbitration; (Bar. Ab. tit. *Arbitration* (*a*); except causes strictly matrimonial. (*Ibid*). And even they, as regards mere damages for breach of promise of marriage, (16 E. 4, 2 pl. 6), or a question arising out of a bond for a divorce *à mensa et thora*. (*Solilleux* v. *Herbert*, 2 B. & P. 444). So, questions connected with *realty* may be referred; and an action of ejectment may be sustained on an award declaring the title to the land to be in the *lessor of the plaintiff*. (*Doe* v. *Rosser*, 3 East, 15; 3 Taunt. 426).

† Unless it seems by consent of all parties interested. (Cald. Rep. 90; 2 Bott. P. L. 716).

occupied by the plaintiff, that the quantity should be ascertained by the parish, and the rate altered accordingly, agreeably to the price set against it in a schedule. On demurrer—

*Abinger*, L., C. B., and *Bolland*, B., were of opinion, that the submission and award were bad, the rate not being a subject capable of being referred to arbitration; and that the costs being incidental to the determination of the question, the consideration for the submission failed; that the direction to repay portions of rates made since the scheme on which the rates had been made had come into operation, was bad, as not binding on the then officers, and there was no power to compel them to obey the award in that respect; that the direction to ascertain the quantity, &c., by the parish was vague and uncertain, as to the persons who were to do the act.

But *Parke*, B., differed from the rest of the Court, and held:—That though the submission of the rate was void, the other matters were distinct, and might be the subjects of an arbitration; consequently the award was not bad as to them.

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REX *v.* MOATE, H. T. 1832. K. B. 3 *B. & Adl.* 237. Abridged post div. *Costs.*

But an indictment for a nuisance may*.

UPON the trial of an indictment for a nuisance, a reference to arbitration was proposed, and assented to, without objection.

## II. OF THE SUBMISSION.

### (*a*) PARTIES TO†.

#### 1. *Agents.*

HENLEY *v.* SOPER, E. T. 1828. K. B. 8 *B. & C.* 16; S. C. 2 *M. & R.* 153.

A power authorising A. to act for B., with power "to appoint any other person he might see fit," enables H. to refer matters to arbitration‡.

THE plaintiff and defendant had been engaged in a partnership concern at Newfoundland. The plaintiff was resident at Newfoundland, the defendant at Plymouth. The partnership was dissolved, and the defendant's son acted under a power of attorney from the defendant; the terms of which were to act on his behalf, and to appoint another if necessary. The accounts, with the consent of the plaintiff and the defendant's son, were submitted to arbitration, under an order of the Court, and an award was made, finding a ba-

* By permission or authority of the Court where depending. (Kyd on Awards, p. 64). So may indictments for an assault, by leave of the Quarter Sessions. (*Baker* v. *Townsend*, 1 B. Moore 120; S. C. 7 Taunt. 422; *Beeley* v. *Hayfield*, 11 East, 46). So may indictments for a conspiracy; (Kyd on Awards, 66); or for not repairing a highway. (2 D. & R. 265). But not for a riot. (*Rex* v. *Grant*, cited Kyd on Awards, 64; and see *Kirk* v. *Strickwood*, 1 N. & M. 275).

† All persons capable of entering into a contract may bind themselves by submission to arbitration. (Com. Dig. tit. *Arbitration*, D. 2).

‡ Although an attorney at law may bind his client by a reference to arbitration, (Bac. Ab. tit. *Arb.* (*C*), it seems a solicitor in Chancery cannot, without express consent. (1 Cha. Rep. 104; sed qu.) And the former may do so, even though his client dissents. (*Filmer* v. *Delber*, 3 Taunt. Rep. 486; 1 Chit. Rep. 193; but see 6 B. & C. 255). Other agents must be however duly authorized; and if the submission be under seal the authority must be under seal. (Dyer, 216, b; 1 Wils. Rep. 28). If an agent enters into a submission in his own name, he is personally liable, and must perform the award. (2 Keble. Rep. 707).

lance in favour of the plaintiffs. On it being objected that the defendant's son had no authority to refer matters to arbitration—

The Court held, that the power authorized a submission to arbitration.

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CURTIS *v.* BARCLAY, H. T. 1826. K. B. 5 *B. & C.* 141; S. C. 7 *D. & R.* 539.

IN this case, A., a merchant residing abroad, made consignments to B., his agent, B. accepting bills on the receipt of the bills of lading, after deducting his charges. A. consigned some goods on those terms to B., and indorsed the bills of lading to him. The master of the ship refusing to deliver the goods to B., he incurred expenses in endeavouring to settle the dispute by arbitration;—

And such an authority may be derived from the nature of the employment.

And the Court held B. entitled to the expenses, and said—Had any part of these expenses been improperly incurred, had the reference been an improper step, had there been any misconduct in B. neglecting to advise A., or whoever at the time might be acting for him, questions upon these points would have been proper for the consideration of the jury.

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2. *Assignees of Bankrupts and Insolvent Debtors*.*
3. *Corporations† and Charities‡.*
4. *Executors and Administrators.*

*Re* HARE, MILNE, AND HASWELL, M. T. 1839. C. P. 8 *D. P. C.* 71.

IN a bond of submission, to which A. & B., who were partners, and C. were parties, it was provided, that, in case of the death of either party during the reference, the award was to be delivered to his personal representatives. B. died before the award was made; and several meetings were held before it was objected, by C., that B.'s personal representatives should be made parties to the submission. An award having been made in favour of A., without B.'s executor having been made a party.

The executors of a deceased party to a reference need not be made parties to the submission, where the latter provides that, in case of death, the award shall be delivered to the representatives§.

*Per Cur.*—There is in the bond of submission a provision, that, in case of the death of either party, before the making of the award, it shall be delivered to his personal representatives, or such of them as shall desire the same. And, as a general proposition of law, it

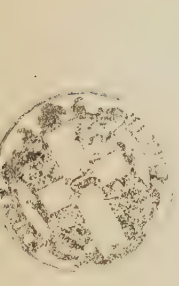
* By 6 Geo. 4, c. 16, s. 88, the assignees of bankrupts, with the consent of the major part in value of the creditors, may refer to arbitration. If the assignees make themselves parties to a bill filed against the bankrupt before his bankruptcy, for specific performance of an agreement, and consent to arbitration without protesting against its being an admission of assets, they are personally liable. (*Robson* v. ———, 2 Rose, 50). As to trustees referring and being personally liable, see *In re Wainsborough*, 2 Chit. Rep. 41. By 7 Geo. 4. c. 57, assignees of insolvent debtors are empowered to refer disputes to arbitration; and the 1 & 2 Vict., c. 110, contains a similar provision.

† Corporations sole may refer to arbitration; (Rolle Ab. tit. *Arb.* 2 A. 2); and so may corporations aggregate, with the consent of the whole corporate body. (Bac. Ab. tit. *Arb.* (*C*) ). And in *Corpe* v. *Glyn*, (3 B. & Ad. 801; Abridged, post div. VI. (*k*) 4th), it was decided that the treasurer of a dock company might submit to arbitration, and that he was not personally liable; but that a mandamus lay against the directors.

(‡) A charity may refer to arbitration, with the consent of the Attorney-General. (9 Ves. 232; 4 Madd. Rep. 274; 1 Tur. & Russ. 58).

§ Without such proviso the death was a revocation of the arbitrator's authority. (See post, p. 292). Executors and administrators may submit matters to

is extremely questionable whether the death of one of the parties on one side avoids an award. (See the cases referred to in "Watson on Awards," p. 27). We therefore think we should not be justified in setting the award aside, upon motion upon this objection. If, upon moving to enforce it by attachment, it could be made to appear to us that the party called upon to perform the award incurred any danger or lost any benefit, by reason of the personal representatives of the deceased partner not having been brought before the arbitrators, in such case, terms and conditions might be imposed, calculated to remove such danger or inconvenience; or the party might be left to his remedy, by action on the award.



5. *Feme Coverts*.*

6. *Infants.*

BIDDELL *v.* DOWS, H. T. 1827. *On Error.* 6 *B. & C.* 255; S. C. 9 *D. & R.* 404; S. C. 3 *Bing.* 20; S. C. 10 *B. Moore,* 272.

An infant cannot bind himself by submission to arbitration†.

A SUIT and all matters between the parties (some adults, some infants, others married females) were, by consent of the attornies of the parties in the suit, referred to arbitration, with a provision that the death of any party should not abate the reference; and, before the award made, one died; and, by the award, his executors were ordered to pay, &c.:—Held, that no sufficient authority being shewn to refer on the part of the infants, who were not competent, there was no mutuality, and that the award founded thereupon could not be sustained.

7. *Joint Contractors and Partners.*

STEAD *v.* SALT, E. T. 1825. C. P. 3 *Bing.* 101; S. C. 10 *Moore,* 389.

A submission by three of five joint contractors does not bind their co-contractors.

IN assumpsit for work and labour, it appeared that the plaintiffs performed the work in question on a joint undertaking, which was confined to the particular contract, and that they were not general partners; and the only question was, whether the account which they had sent in to the defendant for the only work done, had been settled by the terms of an award. It appeared that the submission had been made by articles of agreement, not under seal, and which had been signed by the defendants, and three of the plaintiffs only, for the whole five.

*Bayley,* J., at the trial, held the submission not binding; and the

arbitration, (Dyer, 216), and are bound by the award (Bac. Ab. tit. *Arb.* (*C.*) ) personally. Unless words be used to shew they merely bind themselves as executors and administrators; (1 T. R. 691; 5 T. R. 6; 4 D. & R. 814; 1 Russ. & M. 496); and, in that case, no attachment lies for non-performance of the award. (*Tyler* v. *Jones,* 3 B. & C. 144; S. C. 4 D. & R. 740).

* At law, a feme covert cannot bind herself by submission to arbitration. (Roll. Ab. tit. *Arb.* (*D*); 3 Wils. Rep. 277; Ca. Temp. Rand. 180). But, in equity, it seems that submissions in respect of property settled to the sole and separate use of a feme covert are binding; (2 Ves. 190; 1 Mo. Cha. Rep. 16); though it is difficult to see how the award is to be enforced. (See *Watson* on Awards, 58).

† But, it seems, infancy cannot be made a ground of objection after award made. (*Colcridge,* J., *Jones* v. *Powell,* E. T. 1838, B. C., 6 D. P. C. 483).

case coming before the Court, they said—It appears that the submission to arbitration was signed by three of the plaintiffs only; and the question now is, whether that submission is binding on the five, or can be given in evidence against them? Now, we are of opinion that it cannot. It is quite clear that there was no express authority for the three plaintiffs to enter into a submission for arbitration, as it formed no part of the transactions in which they were engaged; and there is no ground by which an authority can be implied, that they could bind the others by such a submission, to perform an award that might be made under it.

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ADAMS *v.* BANKART AND HEYGATE, H. T. 1835. Ex. 1 *C. M. & R.* 681.

So, one partner cannot bind his co-partner without his consent.

THE plaintiff was the surviving partner of A., and the defendants were partners. Certain accounts existing between the plaintiff and A. and the defendants had been referred to arbitration. The plaintiff had attended the arbitrator and recognised his authority; but it was not shewn that A. had done so. The submission was not by deed. The arbitrator had made his award in favour of the plaintiff, and directed that the defendants should pay a certain sum to them.

*Per Cur.*—One partner cannot bind his co-partner by his submission to arbitration without the consent of the latter. If one binds himself for his partner, he may be liable, though his partner is not bound; and so will the co-partner, if he give authority to bind him. But this is not a matter which arises naturally out of the partnership, nor is it within the ordinary scope of a partner's authority.

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### (*b*) MANNER OF SUBMITTING, AND MAKING THE SUBMISSION A RULE OF COURT*.

RICHARDS *v.* BASSETT, H. T. 1830. K. B. 10 *B. & C.* 657.

The submission must be mutual.

THE plaintiff claimed a right in the soil of land adjoining his farm. The defendant denied that right; and insisted that he had only a commonable right, and, in evidence, produced an ancient instrument, in the nature of a presentment at the manor court, by the freeholders, finding that the then owner of the farm and their claiming the right of soil, had no separate right, but only a right thereon, as the other freeholders, for commonable cattle. It was contended that this instrument amounted to an award.

But the Court held, it was no award, because there was no mutual submission.

* To make an order of reference a rule of Court a duplicate may be obtained, where the arbitrator, through misconduct, refuses the original. (*Thomas* v. *Philby*, E. T. 1833, K. B., *Patteson*, J.—2 D. P. C. 145). Or a party, by misconduct, keeping a submission, will induce the Court to extend the time for making it a rule of Court. (*In re Perring*, M. T. 1834, K. B., *Williams*, J.—3 D. P. C. 98).

And where two parts of a deed of submission to arbitration were executed, and the arbitrator indorsed the enlargements of the time for making his award on one part, the Court compelled the party in whose possession that part was to make it a rule of Court. (*Coleridge*, J.—*In re Smith* v. *Blake*, M. T. 1839, Q. B., 8 D. P. C. 130).

TOMLIN *v.* FORDWICH, T. T. 1836. K. B. 6 *N. & M.* 594; S. C. 5 *Ad. & E.* 147.

One party may submit by deed and the other by simple contract.

IN an action on an award, it appeared that certain differences as to the terms on which a lease should be renewed by a corporation to their lessee was referred, by certain articles of agreement entered into by the defendants (the corporation) *under their seal*, of the one part, and the plaintiffs of the other part. It was objected, the agreement was void for want of mutuality, because the defendants executed the agreement by their seal; and therefore a covenant against them; whereas the plaintiff, it appears, only executed a simple agreement.

The Court overruled the objection. The defendants being a corporation, could only execute the agreement by their seal.

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WINPENNY *v.* BATES, E. T. 1832. Ex. 2 *Cr. & J.* 379; S. C. 2 *Tyrw.* 466; S. C. 1 *D. P. C.* 559.

It seems where causes in two courts are referred the reference cannot be a rule of each Court.

THERE being actions pending, one in the King's Bench and another in the Exchequer, which were agreed to be referred, and the agreement to be made a rule of either Court; having been made a rule of King's Bench, on motion to make the agreement also a rule of this Court—

*Per Cur.*—We think it can only be made a rule of one Court. It has already been made a rule of the Court of King's Bench, and that Court is quite competent to do justice.

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PAULL *v.* PAULL, H. T. 1834. Ex. 2 *D. P. C.* 340—S. P. HALDEN *v.* GLASSCOCK, E. T. 1826. K. B. 5 *B. & C.* 390; S. C. 8 *D. & R.* 151.

Under a Judge's order to refer a consent by the defendant's attorney, is sufficient to make it a rule of Court*.

THE affidavits stated that no authority had ever been given that the Judge's order should be made a rule of Court, and that the attorney, in consenting to it, had acted without authority.

*Per Cur.*—With respect to the order having been made a rule of Court without the defendant's consent, it might be done without his consent, his attorney consenting for him.

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STORY AND OTHERS, *In re*, M. T. 1837. K. B. 7 *Ad. & E.* 602; S. C. 2 *N. & P.* 667.

An agreement to refer, that the award may be made a rule of Court, extends to the submission, under 9 & 10 Will. 3, c. 15.

THE agreement of reference was, that the award of the arbitrators therein named should be made a rule of Court; but nothing was said of the submission to arbitration. The award was made; and, afterwards, a rule was obtained making the agreement of reference a rule of Court. On motion to set it aside—

The Court discharged the rule, saying—In *Pedley* v. *Westmacott*, 3 East, 603, it was objected that the consent in the submission-bond was to make the award a rule of Court, instead of the submission;

* Where an arbitrator, under a power reserved to him by the terms of the submission, enlarges the time for making his award, the enlargement is to be considered as part of the original submission, and must be made part of the rule of Court, in order to move to set aside the award. The practice has always been to make the submission and the enlargement of the time for making the award a rule of Court by one motion. (*Per Coleridge J.—In re Smith* v. *Blake*, M. T. 1839, B. C., 8 D. P. C. 131).

and, therefore, that the case was not within the statute, inasmuch as the power there given to litigant parties is, "to agree that their submission of their suit to arbitration shall be made a rule of Court. But on *Powell* v. *Phillips* (2 Tidd, 821; 9 Ed.) being referred to, where the submission-bond, stating that the award should be made a rule of Court instead of the agreement, was holden to be no objection, Lord *Ellenborough* said, that this was the later and more sensible determination.

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LORD BOSTON *v.* MERHAM, M. T. 1840. Ex. 8 *D. P. C.* 867.

ON motion to make a submission to arbitration a rule of Court, the original was not produced, but merely a copy, because, it was stated, the former was in the possession of the adverse party.

*Sed Parke*, B.—The original should be produced; to compel its production, there must be a rule calling on the opposite party.

A submission cannot be made a rule of Court without the original; and if in the possession of the adverse party, a rule will be granted to compel him to produce it.

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M'ARTHUR *v.* CAMPBELL, M. T. 1833. K. B. 2 *Nev. & Man.* 446, n.

BY the order of reference, no power had been given to the arbitrator to enlarge the time of making his award; that the time had been enlarged by the consent of the parties; but that this latter submission had not been made a rule of Court.

*Per Cur.*—In order to entitle the parties to make a substituted submission a rule of Court, it would seem to be necessary that it should be reduced into writing, and should contain a consent to its being made a rule of Court, either by express words, or by reference to the provision to that effect in the original submission.

Where there is no authority to enlarge the time, and another agreement to that effect is entered into, it cannot be made a rule of Court unless the original submission authorises it.

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(*c*) CONSTRUCTION OF*.

CRUMP *v.* ADNEY, H. T. 1833. Ex. 1 *C. & M.* 355; S. C. 3 *Tyrw.* 270.

IN an agreement of reference, empowering an arbitrator to settle and fix an annuity to be purchased by executors, for the widow of their testator, and in case the said arbitrator shall award any such annuity, he shall or may award the same with a proviso, that, in case of a deficiency of assets of the testator, the annuity, or the fund from which the same shall arise, shall abate in the same manner as if it were a provision in the will; it was contended, that the words, "shall or may," gave the arbitrator a discretionary power, and were not imperative.

*Sed per Cur.*—According to the construction contended for, the words, "shall" and "may," would be at variance and inconsistent with each other; but if they are so construed as to give both effect, the word "shall" must become imperative.

In a submission, the words "shall or may" are imperative.

* On a reference to arbitration it was agreed that the award should be made by the umpire within two calendar months next after the matters were referred to him. The umpire was appointed on the 29th June, and the time of making the award was enlarged for three months. Held: that, in computing this time, the 29th June was to be excluded; and that, consequently, an award made on the 29th of September was within the time limited. (*Ex parte Higham and Jessop*, M. T. 1840, B. C., 1 Woll. 28).

BROWN *v.* SMITH, M. T. 1840. Ex. 8 *D. P. C.* 835.

An award, dated "13th October, 1840," directed a sum of money to be paid "28th October next:" held, that it meant the 28th of that month.

AN award, dated "13th October, 1840," ordered that the defendant should pay a certain sum of money on the "28th day of October next." The sum being demanded, and refused, because it meant October 1841, motion was made for an attachment;—

And the Court made the rule absolute, because the word "next" applies to the day as well as the month.

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(*d*) AMENDMENT OF.

DRAKE *v.* BROWN, T. T. 1835. Ex. 2 *C. M. & R.* 270.

An order of reference will not be varied upon suggestion by one party of subsequently discovered matter*.

BY Judge's order a cause was referred. The question submitted to the arbitrator's determination being, whether a sum of money which had been paid by the plaintiff into the hands of the defendant, for the purpose of being paid over to the estate of an intestate, but which payment over had been subsequently countermanded by the plaintiff, was, in fact, due from the plaintiff to the estate of the intestate or not.

The Court refused to grant a rule nisi for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties, an administratrix, had obtained since the hearing at Chambers.

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(*e*) OF A SECOND SUBMISSION.

DOE *d.* FISHER *v.* SAUNDERS, T. T. 1832. K. B. 3 *B. & Ad.* 783.

Where the time has passed through the negligence of the plaintiff's attorney, the Court will not compel the defendant to enter into a new submission.

AT the Lent Assizes a verdict was taken for the plaintiff, and the cause was referred, the award to be made by the first day of Easter Term; and the plaintiff's attorney neglected to obtain the order of reference until after the time for making the award expired.

On motion to allow the plaintiff to proceed on the verdict, unless the defendant should consent to a new order of reference, the case of *Gregory* v. *Taylor*, 2 B. & Ad. 774, was cited, where the reference had gone off without any fault of the plaintiff, the arbitrator having declined to proceed, on finding that he had been consulted in the cause.

*Per Cur.*—The arbitrator did not proceed, owing to the fault of the plaintiff. The cause was deserted by the attorney, and the plaintiff may take the cause down again for trial.

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(*f*) DUPLICATE ORDER OF REFERENCE†.

(*g*) REVOCATION‡.

1. *In General.*

Before 3 & 4 Will. 4, c. 42, s. 39‡.

SKEE *v.* COXON, H. T. 1830. K. B. 10 *B. & C.* 483.

WHEN this cause was called on for trial, a verdict was, by con-

* But a transposition of the Christian and surname of a party in the order of reference may be amended. (*Littledale*, J.—*Price* v. *James*, M. T., 1833, B. C., 2 D. P. C. 435).

† A duplicate order of reference may be had where arbitrator detains the original. (*Patteson*, J.—*Thomas* v. *Philby*, E. T. 1833, B. C., 2 D. P. C. 145. See ante, 285, note).

‡ By which it is enacted, that the power and authority of any arbitrator or um-

sent, entered for the plaintiff, subject to a reference upon special terms; one of which was, that the ship, the insurance upon which was the subject-matter in dispute, should be repaired by the underwriters. The repairs were accordingly commenced, and the plaintiff afterwards revoked her submission. A rule nisi was thereupon obtained, calling upon her to shew cause why the revocation of the submission should not be vacated.

there was no difference as to the power of revocation between submission by order of a Judge and an agreement of the parties only.

*Per Cur.*—We have no power to vacate the revocation, or to stay the plaintiff's proceedings, so as to compel her to refer again. It has never been disputed that the authority given to an arbitrator is revocable at any time before his award is made; and it is too late now to contend that it is not so; and whether the submission was, by order of reference or otherwise, has not been considered as making any difference, nor has the Court any power to give costs, unless they have that power by the submission, which in the present case is wholly silent on the subject.

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GREENWOOD *v.* MISDALE, E. T. 1825. Ex. 1 *M. & Y.* 276.

Although when made a rule of Court it could be revoked.

RULE to set aside an award, the authority of the arbitrators having been revoked. The cause had been referred to arbitration, by an order of one of the barons, which was not made a rule of Court.

*Per Hullock*, B.—It has been decided repeatedly, that a judge's order, and even an order of Nisi Prius, may be revoked until it is made a rule of Court.

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REX *v.* BARDELL, M. T. 1836. K. B. 1 *N. & P.* 74—S. P. REX *v.* SHILLIBEER, M. T. 1836. K. B. 5 *D. P. C.* 238.

The 3 & 4 Will. 4, c. 42, s. 39, applies only to civil matters, and not criminal; and, therefore, where an indictment is referred the submission may be revoked.

AN indictment for a conspiracy at the Sessions was removed by certiorari into this Court. It was ordered by the Court, and with the consent of all parties, their counsel and attornies, that the jurors should be discharged from giving a verdict subject to an award.

The order was made a rule of Court. And the authority of the arbitrator subsequently being revoked, the question was, whether the submission to reference in the present case could be revoked since the passing of 3 & 4 Will. 4, c. 42, s. 39, without leave of the Court.

pire, appointed by or in pursuance of any rule of Court, or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator, or umpire, shall, and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference, and that the Court, or any judge thereof, may, from time to time, enlarge the term for any such arbitrator making his award. To induce the Court to permit a party to rescind his submission, strong ground must be laid before them. (*James* v. *Attwood*, 7 Scott, 841; S. C. 9 Sim. 177).

In cases not within the act, although an award after notice of revocation, would be invalid, yet, if there has been a mutual agreement, bond or covenant, to submit to arbitration, and abide by an award to be thereupon made, it is clear that upon proof that there was a debt or damages to a certain or ascertainable amount justly recoverable, and which probably would have been awarded, the same sum would probably be recovered from the party revoking, and his surety, in an action upon the contract of submission, assigning the revocation as a breach thereof; and probably upon stating the payment of costs and expenses occasioned by the revocation as special damages, these also would be recovered. (4 B. & C. 103; S. C. 6 D. & R. 213).

*Per Cur.*—This is not a case within the act. The act appears to us to apply to two specific kinds of submission of civil disputes, the one by order of Nisi Prius, and the other by agreement; and not to a submission of an indictment. This, therefore, was not an agreement intended by the act.

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BRIGHT *v.* DURNELL, H. T. 1836. Ex. 4 *D. P. C.* 756.

Nor does the 3 & 4 Will. 4, c. 42, s. 39, prevent a revocation where the performance of a condition precedent has been omitted.

BY deed of copartnership, it was provided, that if any dispute should arise between partners respecting the partnership affairs, such difference was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an umpire before they commenced proceedings. The plaintiff named an arbitrator, who refused to act, and the plaintiff appointed another, and the defendant having also named one, the two arbitrators met once, for the purpose of appointing an umpire, but they could not agree; and immediately afterwards the plaintiff revoked the authority given to his arbitrator. It was contended that this was a case within the 3 & 4 Will. 4, c. 42, s. 39, which enacts, "that the power and authority of an arbitrator, or umpire, appointed in pursuance of any submission, containing an agreement that such submission may be made a rule of Court, shall not be revocable by either party, but that the arbitrator, or umpire, may proceed notwithstanding such revocation."

*Per Cur.*—It appears to us to be a condition precedent that an umpire should be appointed. The act only applies to cases where the arbitrators and umpire are appointed. The agreement contained in the deed was, that the arbitrators should appoint an umpire, which they have not done.

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CLARKE *v.* STOCKEN, E. T. 1836. C. P. 2 *Bing. N. S.* 651; S. C. 3 *Scott*, 90; S. C. 5 *D. P. C.* 32.

A judge at chambers has no power, on an ex parte application, to revoke an order of Nisi Prius.

A CASE was referred by order of Nisi Prius. At the arbitration the plaintiff's attorney proposed to prove the sale, delivery, and value of the goods for which the action was brought; but those facts were admitted by the defendant's attorney, who then put forward the plea of the statute of limitations, and contended that such plea was a bar to the action; and it was admitted, that should the arbitrator be of such opinion the plaintiff's claim would be barred, with the exception of some items which amounted to 26*l.* 13*s.* 3*d.* The arbitrator, however, was of opinion, that the statute of limitations was not a bar to the action, or to any part of the amount sought to be recovered thereby, according to the evidence which had been adduced before him. The defendant's attorney then pressed the arbitrator to raise the question as to the effect of the statute of limitations upon his award, that he might take the opinion of the Court upon it. This, however, the arbitrator refused to do; and, finally, he intimated his intention of making an award in the plaintiff's favour. The attorney for the defendant applied to a judge upon an ex parte statement, and obtained an order by which the defendant was enabled to revoke the order of reference. On motion to set that order aside—

*Per Cur.*—The rule must be made absolute. The judge here has heard only one party, and we are of opinion that the case stands as if the leave of the judge had not been given. The case is precisely as if an application were made to the Court to set aside any pro-

ceeding which had taken place. The Court would not assent to such application ex parte; they would not set aside absolutely under such circumstances; they would merely grant a rule nisi. Just so should an application be treated which is made before a single judge, and here it should be considered as if it was never made. The order should be considered of no avail, as both parties ought to have been before the judge, whereas only one was.

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2. *By Bankruptcy or Insolvency**. But see 2 *Peters. Ab.* 127.

MARSH *v.* WOOD, T. T. 1829. K. B. 9 *B. & C.* 659; S. C. 4 *M. & R.* 504.

Bankruptcy seems a revocation of the arbitrator's authority, and at all events the assignment to the assignees amounts to it.

IN covenant, it appeared that before the bankruptcy of A., all differences and disputes between A., B., & C., they had agreed to refer to an arbitrator in the said indenture mentioned, in consideration of the premises, the said parties thereto did mutually agree to stand to and abide by the award of W. S. The breach assigned was, that the defendants revoked their said submission. The defendants pleaded the bankruptcy of A. generally, before the revocation, and also a special plea of A.'s bankruptcy; and adding, that before any award was made, the commissioners assigned to D. E., the provisional assignee, all claim, right, interest, or demand whatsoever, of or belonging to the said A., in or concerning all and every the matters or things in dispute, or difference, between him and the defendants.

*Per Cur.*—It is an admitted principle, that the very essence of an arbitration is, that the submission should be mutual, and that the award should be mutual and final. Here, although the submission was at first mutual it did not continue so; but an assignment was made of A.'s claim, which destroyed the mutuality. Neither would the award have been mutual, if made; it would as to one side have been quite ineffectual, and this change was the effect of A.'s bankruptcy. We think, therefore, that the defendants were justified in putting an end to the arbitration. It is not necessary for us to lay down any general rule upon the questions, whether the bankruptcy of either party to a submission is of itself a revocation of the submission.

*See Andrews* v. *Palmer*, 4 *B. & Ald.* 250; *Haswell* v. *Thorogood*, 7 *B. & C.* 705.

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TAYLOR *v.* SHUTTLEWORTH, H. T. 1840. C. P. 8 *D. P. C.* 281. S. C. 6 *Bing.* 277.

In a subsequent case, the bankruptcy of a defendant, pending a reference, where a verdict has been taken for the plaintiff, was held no ground for setting aside the award; nor does it, it seems,

THE Court, in this case, (Abridged, post, 320), held, that the bankruptcy of the defendant, four days before the date of the award, and the striking of a docket against him on the same day, of which the arbitrator had notice, pending the reference, did not operate as a revocation of the submission in a case like the present, where the bankruptcy was set up, and attempted to be taken advantage of, not by the assignees, but by the party himself; and also that the question was too grave in its nature, and important in its consequences,

* Whether taking the benefit of the Insolvent Act after submission to arbitration, and before award made, amounts to a revocation, the Court refused to decide on motion. (*Hobbs* v. *Tenens*, T. T. 1840, Ex., 8 D. P. C. 779; Abridged, post, div. *Setting aside Award*). See also *Snook* v. *Hellyer*, 2 Chit. Rep. 43; *Andrews* v. *Palmer*, 4 B. & Ald. 250).

operate as a revocation of the submission.

to be decided upon motion. See *Andrews* v. *Palmer*, 4 B. & Ald. 250.

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### 3. *By Death.*

CLARKE *v.* CROFTS, E. T. 1827. C. P. 4 *Bing.* 143; S. C. 12 *Moore*, 349—S. P. DOWSE *v.* COXE, E. T. 1825. C. P. 3 *Bing.* 20; S. C. 10 *Moore*, 272; *Ab.*, post, div. (*S*) 1st. (*a*).

Death does not revoke the submission where it contains a power for the arbitrator to proceed, if requested by the representatives of the deceased, and that request be made*.

BY an order of reference, an arbitrator was empowered to settle all matters in difference between the parties, who were to be bound by his determination, so as the arbitrator should make his award, to be delivered to the parties, or, if any of them should be dead before the making of the award, then to their respective personal representatives, who should require the same on or before a given day, or any other day, to which the time should be enlarged. The plaintiff died before the award was made, and his executrix required the arbitrator to proceed with the reference; and, having duly enlarged the time, made his award. On motion to set it aside—

*Per Cur.*—It is true that the death of one of the parties to a reference, before the award is made or executed, operates as a revocation of the arbitrator's authority, yet it is quite clear that such an event may be guarded against by the terms of the submission. So, although death may prevent the operation of the law, yet it may be guarded against by an express contract between the parties themselves. Although it has been said that our decision in the case of *Dowse* v. *Coxe*, 3 Bing. 20, has been reversed by the Court of King's Bench, yet, unless we could see the grounds on which that Court acted, we are not bound to yield to its authority. But it is most extraordinary if the Judges there should have laid down a different doctrine to that in *Dowse* v. *Coxe*, as they have expressly decided the point in *Tyler* v. *Jones*, 3 B. & C. 144. The order of Nisi Prius, in that case as well as the present, was in the same words: viz. "so as arbitrator should make his award ready to be delivered to the parties, or either of them; or if any of them should be dead before the making of the award, then to their respective personal representatives who should require the same;" and the Court there said—"As the order of reference gave the arbitrator express power to make his award after the death of either of the parties, it must be intended to give him, incidentally, the same power of enlarging the time after that event." There is no law to prevent a man from binding his executors or administrators; and here both the plaintiff and defendant have done so by an express contract or undertaking; and as the plaintiff's executors would have been bound, in case the arbitrators had decided against him, so the defendant is bound also, and cannot take advantage of the plaintiff's death when he has expressly provided against it.

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SMITH *v.* FIELDER, M. T. 1833. C. P. 10 *Bing.* 306; S. C. 3 *M. & Scott*, 853; S. C. 2 *D. P. C.* 764.

So, where under order of refer-

ON motion to set aside an award, it appeared that the plaintiff and defendant referred the matter in dispute to arbitration, under

* Where one party dies before the award is made the reference is at an end, unless the representatives are expressly bound by the submission. (*Orphan Board at the Cape, &c.* v. *Riemen*, 1 Knapp. P. C. 83). See ante, 283.

an order of the Judge at Nisi Prius. By the terms of the arbitration, the death of either litigating party was not to operate as a revocation. Each party was at liberty to examine his adversary, and the rights of both were to be saved at equity. Pending the arbitration, and without being examined, the plaintiff died. The defendant continued to receive admissions for some weeks after the death, and then revoked his submission, upon the ground that the condition of the arbitration could not be complied with, as he, the defendant, was deprived of the benefit of the plaintiff's testimony.

ence, plaintiff and defendant are to be examined, and death of either not to revoke: —Held, that death before examination was no revocation.

*Per Cur.*—There was no revocation of the arbitrator's authority. However, there is something peculiar in this arbitration, inasmuch as it was not to be final, but it was to save and reserve all the rights of the contending parties in equity. It was also provided, that the death of either party was not to operate as a revocation of the arbitration. Now the party who was prudent enough to retain all his rights at equity, and to make it a condition that he should not be restricted from pursuing them before such tribunal—who was prudent enough to provide that the death of either should not operate as a revocation of the arbitration—the party thus prudent is bound to point out distinctly to the Court the points on which he intended to have his opponent examined before the arbitrator. This, however, he has not done. The clause enabling the arbitrator to examine either party at the request of the other, is only the common clause inserted in every submission.

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MACDOUGALL *v.* ROBERTSON, M. T. 1827. Ex. 2 *Y. & J.* 11; S. C. (*in Error*), 4 *Bing.* 435; S. C. 1 *M. & P.* 147.

THE submission to arbitration contained a proviso that the submission should not vacate or expire through the death of either of the parties. One party having died and the other having revoked the arbitrator's authority—

And the same holds where no power of examining the party is given.

*Per Cur.*—There can be no doubt that where there is no express stipulation upon the subject, the act or death of a party will revoke the authority given to an arbitrator, and render an award, made after that revocation, null and void. But the question here is, whether the parties cannot validly and effectively stipulate that the death of one or either shall not revoke it. This point seems to be now perfectly established.

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4. *By Marriage**.

5. *Partiality in Arbitrator.*

STEWARD *v.* WILLIAMSON, H. T. 1829. C. P. 5 *Bing.* 415.

THE plaintiff and defendant mutually entered into bonds to submit to arbitration a certain claim of the plaintiff on a charter-party for the hire of a ship. The umpire chosen by the arbitrators evincing partiality towards the defendant, the plaintiff, before the

Partiality in an arbitrator is a ground of revocation†.

* It is probable that the marriage of a woman pending a reference, although a legal revocation, would be considered a revocation by her own act within the meaning of the 3 & 4 Will. 4, c. 49, and that an arbitrator might, in such a case, proceed. (See 5 East, 266; 4 B. & Ad. 252).

† So, where upon an agreement for a lease, the rent to be fixed by arbitrators, or, in case of their not agreeing, to be at liberty to call in a third party, who fixed the amount, upon an agreement by the tenant to lay out certain sums, but which the lessors had no power of enforcing under the original agreement; it appearing also that one of the arbitrators had acceded to the amount fixed, not upon his own

award was made, revoked his authority, and afterwards brought an action on the charter-party, and recovered a verdict for 1500*l.*, and sued out execution thereon. The umpire, notwithstanding the revocation, made an award in favour of the defendant, who afterwards commenced an action against the plaintiff on the arbitration bond, but, by reason of the plaintiff's being resident in Scotland, was unable to serve him with process. On motion to order the execution issued at the suit of the plaintiff in the action upon the charter-party to be stayed—

*Per Cur.*—The conduct of the umpire was highly improper; and, under the circumstances, we cannot say that the plaintiff was guilty of a contempt of the order of the Court in revoking the power he had previously delegated, when he found that it was about to be made an improper use of. If a party has reasonable grounds to believe that the arbitrators are acting improperly, he may revoke the authority at any time before the award is made.

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### 6. *Consequences of Revocation.*

BROWN *v.* TANNER, T. T. 1825. Ex. 1 *M. & Y.* 464; S. C. 1 *C. & P.* 651; S. C. HEWLETT *v.* LAYCOCK, M. T. 1827, N. P. 2 *C. & P.* 574.

Assumpsit lies for revoking the arbitrator's authority.

ON assumpsit, the plaintiff declared that the defendant undertook to perform the agreement to refer to arbitration, and not to revoke the submission, and assigned the revocation as a breach. At the trial the plaintiff put in the agreement of reference and award. The material words of the submission were as set forth in the declaration; but it was not under seal, and contained no express provision against revoking the submission or hindering the arbitrators or umpire from making an award. For the defence, a deed was put in, executed by the defendant, whereby he revoked his submission and all the authority given to the arbitrators and umpire before award made. On this evidence the plaintiff obtained a verdict. On motion to set it aside—

*Per Cur.*—Though there was no express contract against revoking, yet the undertaking to stand to, obey, and perform the award was, in point of legal effect, a promise not to revoke; and that the revocation of the submission was a virtual refusal to stand to the award, and a breach of the agreement, and therefore a good cause of action.

*See Tattersall* v. *Groote*, 2 *B. & P.* 131.

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WARBURTON *v.* STORR, E. T. 1825. K. B. 4 *B. & C.* 103; S. C. 6 *D. & R.* 213.

So, where the parties bound themselves in a penalty in case they did not perform the award, one of them revoked

TWO parties agreed by writing, not under seal, to refer their differences to the arbitration of C. S., and bound themselves mutually in a penalty for the true and faithful observance and performance of the award to be made by him. Before award made, defendant revoked the arbitrator's authority. On debt to recover the penalty—

*Per Cur.*—Vynior's case, 8 Co. 162, applies to the present, viz. that, as the obligor had by his own act made the condition of the

judgment, but on the consent of one of the parties interested; the House of Lords, considering that the Court below ought to have refused to decree a specific performance of the award, reversed the judgment. (*Chichester* v. *M'Intire*, 1 Dow. P. C., N. S. 460).

bond impracticable, the bond had become single: applying that to this covenant, it comes within the rule first stated; for, by revoking the authority of the arbitrator, the defendant has broken that covenant and subjected himself not to liquidated damages, but to an action for the penalty.

the arbitrator's authority;—held, that he incurred the penalty.

*See* 1 *D. & R.* 106; *S. C.*, 5 *B. & Ald.* 507; 3 *M. & Sel.* 145.

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(*h*) Effect of.

Hall *v.* Rouse, T. T. 1838. Ex. 4 *M. & W.* 24; S. C. 6 *D. P. C.* 656.

A cause was referred and a verdict entered for the plaintiffs, subject to the award of an arbitrator, who might alter the verdict. The order of reference not having been delivered to him until the time for making his award had expired, the reference was not proceeded in. The plaintiffs subsequently obtained an order for examining a witness upon interrogatories, when the defendant's attorney attended and cross-examined. The plaintiffs afterwards gave notice of trial of the same cause, which was tried as an undefended cause:

Where a verdict is taken, subject to a reference, which is not proceeded with, the plaintiff cannot take the cause down to trial again whilst the verdict stands.

The Court held, that it was an irregularity to go to trial again while the former verdict remained, and that the irregularity was not waived by the attendance and cross-examination of the witness.

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Miller *v.* Spurrs, H. T. 1833. C. P. 2 *M. & Scott*, 730.

After verdict and submission to arbitration the defendant died; and the arbitrator soon afterwards, in Trinity Term, made his award in favour of the plaintiff; and after the expiration of two terms since the death of the defendant, a rule was obtained on the part of the plaintiff, calling upon the executrix of the defendant to shew cause why judgment should not be entered up nunc pro tunc.

Where, after verdict and before award, the defendant dies, judgment may be entered nunc pro tunc.

*Per Cur.*—The rule must be absolute. We are of opinion that this case falls within the general rule, that a delay imposed by the authority of the Court shall not turn to the prejudice of the party. The delay here arose from the obedience of the parties to the order of the Court, by which the plaintiff was prevented from entering up judgment until after the arbitrator had made his award. But for that circumstance, judgment might and would have been obtained before the death of the defendant.

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## III. OF THE ARBITRATORS.

(*a*) Appointment of.

Regina *v.* Northwich Savings' Bank, H. T. 1839. Q. B. 1 *P. & D.* 477.

By the 9 Geo. 4, c. 92, s. 45, it is enacted, "That if any dispute shall arise between any saving banks, or any person or persons acting under them, and any individual depositor therein, or any executor or administrator, next of kin, or creditor of any deceased depositor, or any person claiming to be such executor, administrator, next of kin, or creditor, then, and in every such case, the matter so in dispute shall be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the trustees or managers of

The Court will not grant a mandamus to appoint an arbitrator under the 7 Geo. 4, c. 92, where the depositor is dead.

such institution, and the other by the party with whom the dispute arose." And, by rule of a savings bank, no claim for any sum of money could be made more than seven years from the death of a depositor. On a rule nisi for a mandamus to the trustees of such a bank to appoint an arbitrator, it appeared that the depositor died in 1826—

And *per Cur.*—The rule presents an unanswerable objection to the present application, which is not made until twelve years after the death of the alleged depositor.

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TUNNO and BIRD, M. T. 1833. K. B. 5 *B. & Ad.* 488; S. C. 2 *N. & M.* 328.

A substituted arbitrator may be appointed by a parol consent, though the original submission be by deed.

IN this case there was a submission by deed. At a meeting, and after the umpire was chosen, but before the actual appointment, it was agreed, by a memorandum in writing not under seal, that A. B. should be appointed an arbitrator in the place of C. D., who had declined to act in the reference, which memorandum was signed by the parties; and an award was accordingly made. On motion to set aside the award, it was objected that C. D. was not lawfully appointed arbitrator.

*Per Cur.*—We think the appointment good and binding.

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(*b*) RIGHTS AND DUTIES OF.

*As to Examination of Witnesses by.* See post, p. 302.

ARBUKLE *v.* PRICE, T. T. 1835. Ex. 4 *D. P. C.* 174.

Under a submission of all matters in difference, what matters are or are not in difference are to be determined by the arbitrator.

A DEFENDANT submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers; and an attachment moved for against him for not producing them was refused, on the ground that they did not come within the meaning of the submission.

*Per Cur.*—By submitting to the arbitrator all matters in difference, the defendant has submitted to the discretion of the arbitrator the question, what are the matters in difference? and he must be concluded by his opinion.

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BROWN *v.* WATSON, M. T. 1839. C. P. 8 *D. P. C.* 22.

An arbitrator, under reference of all matters in difference, may adjudicate as to debts accruing due, as well as to those actually owing.

A DISPUTE had arisen between the plaintiff and defendant, joint owners of a vessel, as to the mode in which she should be employed, and a suit instituted the 24th March, 1840, in the Admiralty Court; but, by consent, a Judge's order was made for a reference: first, that the plaintiff should purchase of the defendant, and the defendant should sell to the plaintiff, his half share of the vessel for 940*l.*, to be paid in the manner afterwards directed. Secondly, that if the arbitrators should find any money to be due from the defendant to the plaintiff, one moiety of the debt should be paid at such time and place as they should think fit to direct, while the remaining half should be returned by the defendant, in part payment of the purchase-money for the vessel. Thirdly, that the arbitrators should award to the plaintiff, who had hitherto been employed as master of the vessel, such a sum of money as he should,

in their opinion, be entitled to, in respect of providing a master for the brig in its present voyage from London to Archangel, and back; and, finally, that the reference should extend to all matters in difference. An award that he should pay all debts accrued subsequently to the 24th March, and that he should give the defendant a bond of indemnity (*Phillips* v. *Knightley*, 2 Sho. 903; *Cooke* v. *Townsend*, 2 Saund. 337) against the payment of those debts, was holden valid; and that, under the terms of the submission, the arbitrator had power to dispose of a debt not due but accruing between the parties.

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ALLEN and PERRING, *In re*, T. T. 1835. K. B. 5 *N. & M.* 374 —S. P. PERING and KEYMER, *In re*, H. T. 1835. K. B. 3 *A. & E.* 245.

An authority to two out of three arbitrators, though executed by two, must be with the sanction of the third.

THIS was a submission to two arbitrators, and if they could not agree another was to act, and they were to make their award. If the three could not agree, then the award was to be made by any two of them. It appeared that the arbitrators could not agree, and that an award was subsequently drawn up by the umpire, which not entirely meeting with the approbation of the arbitrators they altered it, and executed and published it, so altered, as their award, without laying it before the umpire. On motion to set aside the award—

*Per Cur.*—The award cannot be supported. Any two must act upon all the circumstances; and the two arbitrators having disagreed, and it being then referred to the umpire, it was necessary that they should have submitted the altered award to him. The arbitrators, however, do not proceed to execute the award sent to them by the umpire, but a new and distinct award. They were however bound, after having consulted him, to have heard what he said as to the alterations.

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HETHERINGTON *v.* ROBINSON, H. T. 1839. Ex. 4 *M. & W.* 608; S. C. 7 *D. P. C.* 192.

Where the submission is, that the award shall be made "by two arbitrators and their umpire," it seems an award by the two arbitrators only, is bad.

A CAUSE was referred to two arbitrators, who had power to appoint an umpire, the costs of the cause to abide the event; and each of the parties bound himself to stand, to obey, and keep the award of the said two arbitrators and their umpire, so as the award of the arbitrators and their umpire be made before a certain day. An award was made by the two arbitrators only: and they found two issues for the plaintiff, and one for the defendant, and directed that the costs of the said cause, and the several issues found therein, should be paid to the plaintiff, or to the party entitled thereto. On motion to set the award aside—

The Court said the award is bad. The words of the agreement are, that the arbitrators and their umpire shall act in the matter. If the word "or" had been in the place of "and" it would have been different.

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CROSS *v.* METCALFE, M. T. 1836. K. B. 1 *N. & P.* 232.

Where a verdict has been taken, subject to a reference, the arbitrator cannot amend the record.

IN this case a verdict was taken for the plaintiff by consent, and all matters in difference in the cause were referred to an arbitrator, who certified that, for the justice of the case, the record ought to be amended, by allowing the plaintiff to substitute a replication, putting all the circumstances averred in the plea in issue. On a rule to amend the award accordingly—

*Per Cur.*—The verdict here is taken by consent, and it is only on the verdict that the arbitrator has any power. What authority can this Court have to substitute different matters for those which were agreed to be referred?

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MACKAY *In re*, M. T. 1834. K. B. 2 *A. & E.* 356.

So, an arbitrator cannot award money to be paid to himself which he is to apply to the settlement of some of the matters in dispute.

MOTION to set aside an award. Upon a reference of partnership disputes, a direction in the award was, that some of the parties to the reference pay a sum of money (which was one of the matters included in the submission) to the arbitrator, and that he apply the same to the payment of certain specified demands, also part of the matters submitted.

*Per Cur.*—The objection that payment is ordered to be made to the arbitrator extends to the whole award, and is fatal. No jurisdiction is retained in this case over the arbitrator, who is to receive the money. No security can be taken from him, and no attachment can issue against him if he omits to pay the money over. The arbitrator had no authority to order that he should apply the sums paid to him.

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WOOD *v.* HOTHAM, M. T. 1839. Ex. 5 *M. & W.* 674.

*Semb.*, arbitrator may refer case to the Court without an express power to do so in the order;

*Per Cur.*—Without any clause in the order to that effect an arbitrator has power to state a case for the opinion of the Court.

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WOOD *v.* HOTHAM, M. T. 1839. Ex. 5 *M. & W.* 674.

and if given, it is not compulsory on the arbitrator.

UNDER an order of reference at Nisi Prius, the arbitrator was to be at liberty to raise any point of law, for the opinion of the Court, at the request of either of the parties. The reference was conducted before him; and in the course of it a point of law was suggested, and he was requested to state it to the Court, but declined, and made an absolute award.

On motion to set it aside, on the ground that the clause was a compulsory, and not an enabling one, the Court refused the application.

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TOMES *v.* HAWKES, E. T. 1839. Q. B. 2 *P. & D.* 248; S. C. 10 *A. & E.* 32.

So, an arbitrator, to whom a cause is referred, and who is to give his certificate, may order a verdict to be entered up without an express authority.

A VERDICT was taken for the plaintiffs, and the referee was to hear the evidence and give his certificate. The counsel for both parties consented at the trial, but no order was drawn up, or rule obtained, and the arbitrator, after the assizes were over, directed a verdict to be entered for the defendant. On motion to set it aside, as being unauthorized—

The Court refused the application, as the parties, by conceding to the reference, rendered the finding by the certificate the finding of the jury.

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(*c*) DISABILITIES AND LIABILITIES OF.

JOHNSON *v.* DURANT, M. T. 1830. N. P. 4 *C. & P.* 327.

An arbitrator cannot be a witness to shew on what ground he decided.

AN arbitrator being called as a witness to give evidence in a cause as to what matters occurred before him in his character of arbitrator, it was contended, the matter was now res judicata, and that the arbitrator could not be called to shew under what impression he had decided. To which Lord *Tenterden*, C. J., assented.

TOPE *v.* HOCKIN, T. T. 1827. K. B. *7 B. & C.* 101.

AN arbitrator, without knowledge of any previous act of bankruptcy, paid over money deposited in his hands to a party whom he decided to be entitled to it.

An arbitrator who pays over money, without knowledge of bankruptcy, is not personally liable.

The Court held, that the assignees could not recover it from the arbitrator, because it was clearly placed under his control for a special purpose; besides, in this case, it was never mixed with his own money, but kept separate, as a distinct fund, to answer that purpose. He was to derive no benefit. He afterwards applied it to the intended purpose in part with the express assent, and in part under the authority of the bankrupt. He was therefore, as it appears to us, a mere channel of conveyance.

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BRAZIER *v.* BRYANT, M. T. 1833. C. P. *3 M. & Scott,* 844; S. C. *2 D. P. C.* 757.

IN the year 1825 the cause was referred to an arbitrator; and the amount of his fees and expenses, 87*l.*, was paid by the plaintiff's attorney. The attorney had since died. On an application, in the year 1827, to reduce the amount of the arbitrator's claim, after a reference to the prothonotary, at the instance only of the defendant, that officer, on taxation, allowed 35*l.* The object of the present application was to compel the arbitrator to refund the excess.

Application for an arbitrator to refund any exorbitant fee* must be within a reasonable time.

*Per Cur.*—We think that we cannot, after such a lapse of time, interfere, by directing an inquiry into this transaction.

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(*d*) CONTROL OF THE COURTS OVER.†

BROADHURST *v.* DARLINGTON, E. T. 1833. Ex. *2 D. P. C.* 38.

AN action on an attorney's bill was referred to the clerk of assize, who was to have the assistance of the prothonotary if necessary. On a rule to refer the bill back for reconsideration, upon the ground that too much was allowed for drawing and copying the abstract—

Where an attorney's bill is referred, the Court will see that the arbitrator adopts the proper course.

*Per Cur.*—If the arbitrator intended to adopt the proper rule, and has not done so, then his award is bad. The only question is, whether the rule he has adopted is the correct one.

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BARTON *v.* RANSON, H. T. 1838. Ex. *3 M. & W.* 322; S. C. *6 D. P. C.* 384.

ALL matters in difference were referred to an arbitrator. He, in the award, set out all the facts upon the face of his award, and then awarded that the plaintiff had no cause of action against the defendant, and that he determined the action in favour of the defendant; and, after disposing of a plea of set-off, and awarding by whom the costs of the reference should be paid, concluded thus: But, if the Court shall be of opinion upon the facts hereinbefore

But, where an arbitrator decides, but leaves the same point to the Court, that part may be rejected as surplusage‡.

* See also *M'Arthur* v. *Campbell,* 5 B. & A. 518; S. C. 2 N. & M. 444. Abridged, post.

† When a matter is referred to the Master, and he in the exercise of his discretions has refused to allow further affidavits to be filed after a particular, the court will not interfere with that discretion, by requiring him to receive further affidavits. (*In re Hall,* 8 D. P. C. 326.)

‡ Though in *Sherry* v. *Oke,* H. T. 1835, B. C., 3 D. P. C. 349, *Patteson,* J., decided, that, if an arbitrator leaves a question of law open, the Court will consider it.

stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of 1*s.*, and also pay to the plaintiff his costs of the reference.

*Per Cur.*—(*Bolland*, B., dubitante). We think that the award is good, and that the arbitrator has come to a positive finding, and expressly declared his own opinion that the latter part, in which reference is made to the Court, may be rejected.

## IV. OF THE UMPIRE*.

BATES *v.* COOKE, E. T. 1829. K. B. 9 *B. & C.* 407.

Arbitrators may nominate the umpire in the first instance†.

IT appeared in evidence, that, as soon as the arbitrators were appointed, and before they had inquired into the matters referred to them, or differed in opinion, they appointed an umpire.

*Per Cur.*—That is a very fair mode of making the appointment, in case it should be necessary to have his interference, and we do not think that any legal objection can be made to it.

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FORD *v.* JONES, H. T. 1832. K. B. 3 *B. & Ad.* 248—S. P. *In re* CASSELL, T. T. 1829. K. B. 9 *B. & C.* 624; S. C. 4 *M. & R.* 555—S. P. YOUNG *v.* MILLER, M. T. 1824. K. B. 3 *B. & C.* 407; S. C. 5 *D. & R.* 263.

But an umpire cannot be appointed by casting lots,

THE arbitrators each named a party as umpire, and decided the selection by lot. On motion to set aside the award—

*Per Cur.*—The appointment of the umpire should be a matter of choice, and not of chance. We therefore think that the appointment of the umpire in this case was bad, and that the rule for setting aside the award should be made absolute.

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*In re* TUNNO, M. T. 1833. K. B. 5 *B. & Ad.* 488; S. C. 2 *N. & M.* 328—S. P. GREENWOOD and ANOTHER, *In re*, H. T. 1839. Q. B. 1 *P. & D.* 461; S. C. 9 *A. & E.* 699.

unless by consent, and afterwards appointed pursuant to the submission.

ON motion to set aside an award, it appeared that the parties agreed to the appointment of an umpire by lot, by their being present and giving in names. It also appeared that the umpire so chosen was afterwards appointed in writing, pursuant to the submission.

*Per Cur.*—The rule, as laid down by Lord *Tenterden* in the case in the matter of *Cassell*, 9 P. & C. 624, is, that the appointment of the third person must be the act of the will and judgment of the two; must be a matter of choice, not of chance, unless the parties consent to or acquiesce in some other mode. Here it is clear that the parties did agree to some other mode of choosing the umpire.

* An appointment of an umpire by two arbitrators, under a power to appoint, before entering on the cause of the matter in difference, is good, though the arbitrators have, before such appointment, enlarged the time. (*Cudliffe* v. *Walters*, 2 M. & Rob. 232).

† As to his power of summoning witnesses, &c., see post, p. 302.

JAMIESON and BINNS, *In re*, E. T. 1836. Q. B. 4 *A. & E.* 945.

ARBITRATORS had power to appoint an umpire; and not being able to agree upon one, it was arranged that each should put down, on a separate piece of paper, the names of any four persons they pleased, and they each should be permitted to strike off one of such names, and that they should toss up for the choice of the umpire out of those remaining. This was done, and the umpire who made the present award was nominated umpire in that way. It appeared that this mode was not followed with the assent or knowledge of one of the parties; but the attorney appeared for him to attend the reference, and who did attend the whole, and had a knowledge previously of the way in which the umpire was appointed, though he was not aware that the umpire so appointed had been specially objected to by the arbitrator of his client.

And it must be with the approbation of all parties; an agent's consent will not do *.

*Per Cur.*—If two parties, who are perfectly unobjectionable, are proposed as an umpire, and the arbitrators chose one by lot, and that fact is known to the parties, and they consent to the appointment made in that way, we cannot see any thing to invalidate the award of an umpire so appointed. But, in this case, one of the parties himself knows nothing of the mode in which the appointment was made; and a very material fact is kept out of the knowledge of his agent, even supposing that agent was authorized to bind his principal, by his implied assent from appearing before the arbitrator. But the other parties were clearly wrong in not bringing before the attorney the important fact, that the arbitrator for that party had objected to the name of the party ultimately chosen as umpire.

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*In re* GREENWOOD, H. T. 1839. Q. B. 9 *A. & E.* 699; S. C. 1 *P. & D.* 461.

TWO arbitrators chose their umpire by lot, and the parties to the reference assented to the person being umpire; but it did not appear that each arbitrator knew the person proposed by the other beforehand, or that the parties knew the course pursued in the appointment.

And, where an umpire is chosen by lot, the assent of the parties does not make the election good; unless they know the mode in which the umpire was chosen.

*Per Cur.*—The parties who submit to an arbitration expect that the arbitrators should exercise their judgment on each name submitted to them, and hence the choice by lot is bad. That is the general rule; but, if it be lawful to adopt that course in any case, at least the parties ought to know that that mode has been adopted. Now, it is here left in doubt whether the arbitrators knew the names of the persons proposed by each other, and whether the parties knew of the course which had been pursued.

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MATSON *v.* TROWER, M. T. 1824. N. P. 1 *R. & M.* 17.

ARBITRATORS, disagreeing, appointed an umpire, who, after examining the parties, made his award. It was objected, that the arbitrators had appointed an umpire, which they had no authority to do,

Submitting to be examined by an umpire is an admission of his right of appointment.

*Abbott*, C. J., held, that although no power was given to appoint the umpire, yet, by submitting to be examined by him, they had recognised his authority.

* As the attorney's clerks. (*Littledale*, J.—*In re Hodson*, H. T. 1839, B. C., 7 D. P. C. 569).

## V. OF THE PROCEEDINGS INCIDENT TO A REFERENCE*.

ATTORNEY-GENERAL *v.* DAVISON, H. T. 1825. Ex. 1 *M'Clel. & Young*, 160.

The rules of evidence observed in Courts of law should govern the arbitrator in his reception or rejection of proof.

BY an act of Parliament commissioners were appointed to investigate certain public accounts, and they were directed to take a prescribed oath, and were authorized to summon witnesses and to examine them on oath; and persons giving false testimony were subjected to the penalties for perjury. The commissioners examined witnesses and took down their depositions in writing, and afterwards communicated the effect of them to the party sought to be affected

* By the 3 & 4 Will. 4, c. 42, s. 40, it is enacted, "That, when any reference shall have been made by any rule of Court or order of a Judge at Nisi Prius, or by any submission containing an agreement to make the submission a rule of Court, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned, in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators or by the umpire before whom the attendance is required, shall also be served, either together with, or after the service of such rule or order; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses, and for loss of time as for and upon attendance at any trial; provided also, that the application made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found: Provided, also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order."

Excepting under this provision, there is no power to compel the attendance of witnesses before an arbitrator. Therefore, on a reference by agreement not containing a power to make the submission a rule of Court, the attendance of witnesses is entirely voluntary. Courts of Equity have no jurisdiction under the act to order witnesses to attend arbitrators. (*Hall* v. *Ellis*, 9 Sim. 530).

Before the recent statute of 3 & 4 Will. 4, c. 42, an arbitrator had no power to administer an oath to the witnesses to be examined in the course of the reference. In reference by rule of Court or Judge's order, it is usually provided that the witnesses shall be sworn before a Judge, a Master in Chancery, or a Commissioner. It is apprehended that even on the reference of a cause under a rule or order of Court, that a witness would not, before the late statute, have been indictable for perjury committed in giving his evidence before an arbitrator, on an oath administered under such a power. But now, by the above-mentioned statute of 3 & 4 Will. 4, c. 42, s. 41, it is provided, "That, where in any rule or order of reference, or in any submission to arbitration, containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation, in cases where affirmation is allowed by law instead of oath; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." (Watson on Awards, 102, 103, 104). It is no ground for setting aside an award that the arbitrator has received improper evidence. (*Henby* v. *Halling*, M. T. 1840, Ex., 1 H. & W. 2. In *Matson* v. *Trower*, M. T. 1824, N. P. *Abbott*, C. J.—1 R. & M. 17). Witnesses might be examined in the parties' absence if no objection be made, as the mode of conducting an inquiry on a submission is to be regulated by the arbitrators; hence they may lawfully exclude the parties and their attornies whilst witnesses are being examined. (*Hewlett* v. *Laycock*, *Abbott*, C. J.—H. T. 1827, N. P., 2 C. & P. 574).

by the proceedings, but who had no opportunity of being present at the examination or of cross-examining the witnesses. On a subsequent reference to arbitration of these accounts the Court held, that the arbitrators could not receive as evidence the depositions taken before the commissioners, because they were not admissible in point of law or in Courts of law, arbitrators being bound by the same rules of evidence as the Courts of law; though we believe that arbitrators, especially when not professional men, frequently proceed on grounds not recognised by the Courts; however, it does not appear to us that the admission of this evidence would be either just or expedient.

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SYMES *v.* GOODFELLOW, H. T. 1836. C. P. 2 *Bing. N. S.* 532; S. C. 2 *Scott*, 769; S. C. 4 *D. P. C.* 642.

AN action for board and lodging the defendant's wife. Defendant pleaded non assumpsit. The cause was referred to the arbitration of a barrister, by an order of Nisi Prius; and the arbitrator, notwithstanding an objection made on the part of the plaintiff, received evidence of the wife's adultery, and directed a verdict to be entered for the defendant. On motion to set aside the award, upon the ground that the arbitrator had admitted evidence of a fact not submitted to his decision, under the plea of non assumpsit—

The Court refused, as the parties were bound by the decision of the arbitrator upon a point of law.

But the question as to what evidence ought to be received, being one of law, the Court will not revise it.

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WARNE *v.* BRYANT, M. T. 1824. K. B. 3 *B. & C.* 590; S. C. 5 *D. & R.* 301.

UNDER a reference to arbitration authorizing the arbitrators to examine the parties to the suit on oath, the Court were of opinion, that the words were sufficiently large to empower the arbitrator to examine the plaintiff in support of his own case.

An authority to "examine parties to the suit" sanctions the examination of the plaintiff on his own behalf.

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JAMES *v.* ATTWOOD, T. T. 1839. C. P. 5 *Bing. N. S.* 628.

IN this case it was contended, that, as the order directed the witnesses to be sworn before a Judge, instead of being sworn by the arbitrator, as required by 3 & 4 Will. 4, c. 42, s. 41, it was invalid; the statute was imperative as to the arbitrator, and excluded the power of a Judge or the Court.

*Sed per Cur.*—The statute does not exclude the concurrent jurisdiction of the Court or a Judge to swear the witnesses.

The power given to an arbitrator to swear witnesses does not oust the Court or a Judge of the power also.

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HODSOLL *v.* WISE, M. T. 1838. Ex. 4 *M. & W.* 536; S. C. 7 *D. P. C.* 15, *by name of* HODSON *v.* WILDE.

CAUSE was referred, at Nisi Prius, to a barrister; and it was directed by the order of reference that the parties to the suit, (if the arbitrator should think fit), and their respective witnesses, should be examined upon oath, to be taken before me, (the Judge at Nisi Prius), or some other Judge of the Court of Exchequer, or before a commissioner appointed to take affidavits in the said Court. An objection was made before the arbitrator, that this clause took away his power of swearing the witnesses; but he, being of a contrary

So, an order of Nisi Prius, that witnesses be sworn before a judge or commissioner, does not exclude the arbitrator from administering an oath under

the 3 & 4 Will. 4, c. 42.

opinion, administered the oath to them, and a motion was made by W. to set aside his award.

*Per Cur.*—The form of the order of reference does not oust the arbitrator of the authority given to him by statute, of swearing the witnesses. It is said that the parties, by their agreement, have excluded his authority; but there are no negative words to indicate such an exclusion; and the language of the statute 3 & 4 Will. 4, c. 42, s. 11, is, that, when in any rule or order of reference, it shall be ordered that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator, and he is thereby authorized and required, to administer an oath to such witnesses. We think that this stipulation is cumulative and not exclusive. It gives to a Judge or a commissioner the jurisdiction which the statute gives to the arbitrator; and the witnesses may equally be sworn by either.

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WANSELL *v.* SOUTHWOOD, E. T. 1829. K. B. 4 *M. & R.* 359.

But, before the statute of 3 & 4 Will. 4, the Court could not order a witness to attend before the arbitrator.

ON motion for a rule to compel a person to attend as a witness before the arbitrator, to whom this cause had been referred by order of Nisi Prius.

*Per Bayley*, J.—It is impossible to suppose that since the statute 9 & 10 Will. 3, many instances have not occurred in which the Court would have been called upon to exercise its power in this manner, if they had the power by law. That alone would be sufficient to induce us to pause before we granted the rule; but I believe we have no power to make it.—*Rule refused.*

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WHATLEY *v.* MORLAND, M. T. 1833. Ex. 2 *C. & M.* 347; S. C. 4 *Tyrw.* 255; S. C. 2 *D. P. C.* 249.

If a party attends by counsel without notice, he is not entitled to the costs of the day.

IT appeared that some conversation had taken place between the parties with respect to the attendance of counsel on the part of the plaintiff, but that no distinct notice thereof was given to the defendant. Counsel appeared before the arbitrator for the plaintiff, and the defendant applied for an adjournment, in order that he might instruct counsel; but the plaintiff refused to consent unless the defendant paid the costs of the day. The defendant then delivered a written protest, and the arbitrator proceeded ex parte.

*Per Cur.*—It is unfair that one party only should have the assistance of counsel. The plaintiff's attorney ought regularly to have given distinct notice; and we think, therefore, that the plaintiff was not entitled to the costs of the day.

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## VI. OF THE AWARD*.

### (*a*) WITHIN WHAT TIME TO BE MADE.

SWINFORD, *In re*, M. T. 1818. K. B. 6 *M. & Selw.* 226.

The word "months" in a

BY the deed of reference it was provided, that in case of the arbitrators differing, they should appoint an umpire, whose award

* The Court has no power, under the 3 & 4 Will. 4, c. 42, s. 39, to compel parties to proceed with a reference, the arbitrator having power to enlarge the time for making his award where the time for making it has been intentionally

should be binding, so as it were made within six months next after the date of his appointment. The appointment was made by indorsement, dated 10th August, and the award by the umpire dated the 12th February following.

submission, means lunar months.

The Court held, that there being nothing ultra the expression to explain the meaning of the parties, the six months must be taken to be lunar, and the umpirage therefore bad.

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MACDOUGALL *v.* ROBERTSON, M. T. 1827. Ex. 2 *Y. & J.* 11; S. C. 4 *Bing.* 435; S. C. 1 *M. & P.* 147.

THE submission was in these words: "The award to be made on or before the —— day of ——, or such day to which the submission shall be enlarged."

Where a power to enlarge is given, but no time named, it means a reasonable time*.

The Court held the right to enlarge the time gave a general authority, which must be exercised within a reasonable time.

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POTTER *v.* NEWMAN, M. T. 1835. Ex. 2 *C. M. & R.* 742; 1 *Tyrw. & Gr.* 29; S. C. 4 *D. P. C.* 504.

A QUESTION arose in this case, whether the 3 & 4 Will. 4, c. 42, s. 39, applies to all arbitrations, so as to enable a judge to make an order for enlarging the time beyond what the parties had agreed upon, and without any clause to that effect in the submission, or only to cases where one party has improperly attempted to revoke the arbitrator's authority.

The time may be enlarged under the 3 & 4 Will. 4, c. 42, s. 39, where there has been a revocation, but not otherwise.

*Per Cur.*—That section gives the Court a power to enlarge from time to time, where the arbitrator's power is gone by a revocation; but it would alter the contract of the parties if the Court might enlarge the time in every case.

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WATKINS *v.* PHILLPOTTS, T. T. 1825. Ex. 1 *M'Clell. & Young,* 393.

THE submission-bond was executed on the 9th of December, the time for making the award being on the 1st of February; but an enlargement of the time being necessary, the parties afterwards, on the 4th of January, altered the period for making the award to the 1st of March, and re-executed, the bond being re-stamped.

So, the time may be enlarged by altering and re-executing the submission.

The Court held, that the latter was to be taken to be the period of submission, and the authority under which the award was made good; and that, notwithstanding the submission-bond bore date the 9th of December, it might be shewn when subsequently executed; and that the award was not vitiated by the mis-recital.

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BURLEY *v.* STEPHENS, H. T. 1836. Ex. 1 *M. & W.* 156; S. C. 1 *T. & G.* 413; S. C. 4 *D. P. C.* 255, 770.

AN action was referred to arbitration by an order of Nisi Prius, the award to be made before the 4th day of Easter Term, with

Where the mode of enlarg-

allowed to expire. (*Patteson,* J.—*Doe* d. *Jones* v. *Powell,* H. T. 1839, B. C., 7 D. P. C. 539).

* And where time for making the award is not enlarged according to the submission, on a reference of a verdict for the plaintiff, judgment and execution will be allowed, unless defendant consents to the enlargement. (*Wilkinson* v. *Time,* T. T. 1835, N. P., 4 D. P. C. 37).

ing time is not defined, an appointment for a subsequent meeting, which was not objected to, is a good enlargement.

power to the arbitrator to enlarge the time for making his award. The arbitrator made an award on the 27th June. On motion to set aside the award, it appeared that before the expiration of the period within which the award should have been made, he appointed another meeting to be held on a subsequent day, in the presence of the agents of both parties, who made no objection, and executed his award on that day.

The Court thought the circumstances amounted to a due enlargement, as no special mode of enlargement was pointed out.

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LAWRENCE *v.* HODGSON, M. T. 1826. Ex. 1 *Y. & J.* 16.

So, where parties proceed, with a knowledge that the time has not been duly enlarged, the objection is waived.

ORDER of reference at Nisi Prius, that the arbitrator direct at what price the defendants, or A. B., who for that purpose became a party to the submission, should purchase a certain piece of land, and the award to be made within a limited period, with power for the arbitrator to enlarge the time in the usual way. The time was not duly enlarged; but it appeared that the defendants had proceeded with the reference, knowing that the time had not been enlarged.

*Per Cur.*—The parties having gone before the arbitrator with a knowledge of the objection, must be taken to have waived it; and the Court will not now interfere.

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BENWELL *v.* HINXMAN, H. T. 1835. Ex. 1 *C. M. & R.* 935; S. C. 3 *D. P. C.* 500; S. C. 5 *Tyrw.* 509.

So, an irregular enlargement of time is waived by a subsequent regular extension by consent,

BY an order of reference, all matters in difference in a cause were referred to an arbitrator, so as the award should be made on or before a certain day, or on or before such further or ulterior day as he should from time to time appoint and signify in writing under his hand, to be indorsed on the said order, and as the said Court or a Baron thereof might order. The arbitrator made an enlargement, but it was not confirmed by a Judge's order; and afterwards two orders for an enlargement were made by a Baron of the Court, with the consent of the parties; but these were not indorsed by the arbitrator. On motion to set aside the award—

The Court held, that no objection could be taken to the former irregularity.

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HALLETT *v.* HALLETT, E. T. 1839. Ex. 5 *M. & W.* 25; S. C. 7 *D. P. C.* 389.

or by subsequent attendance before the arbitrator.

ON motion to set aside an award, it appeared that an arbitrator, who had power to enlarge the time for making his award by indorsement on the order of reference, made the following indorsement:—"I direct that a rule of this Court shall be applied for, by counsel's hand, to enlarge the time of making my award." No such rule was applied for; but the parties subsequently attended meetings before the arbitrator, and made no objection to the regularity of the enlargement.

*Per Cur.*—The arbitrator has power to enlarge the time by indorsement; then he says, in substance, "I mean to enlarge the time for making my award, and I ask the concurrence of the Court in my doing so." The Court does not intimate its concurrence; but that was unnecessary, so that it stands on the expression of the arbitrator's own opinion, that the time ought to be enlarged. We arestrongly inclined to think it was a good enlargement in point of

regularity. But, at all events, it is clear that the parties attended as upon a good enlargement; and therefore we ought not to set aside the award.

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LEGGETT *v.* FINLAY, M. T. 1829. C. P. 6 *Bing.* 255; S. C. 3 *M. & P.* 629.

BY an order of reference the award was to be made by a given day, or such farther time as the arbitrator should appoint, by indorsement on the order. The arbitrator accordingly enlarged the time, and, before the expiration of the extended period, the plaintiff, at his request, obtained a judge's order for a further enlargement, and the arbitrator afterwards, and without any indorsement of the second enlargement on the original order, made his award.

And the same rule holds where no indorsement of an enlargement of time has been made.

*Per Cur.*—The power of the arbitrator was not limited to one enlargement. It is contended, that the second enlargement was made without authority. If, however, it sufficiently appears to us that the parties assented to the act of the arbitrator, the particular mode of enlargement prescribed by the order of reference is thereby waived. The question, therefore, is, whether there has been such consent. The plaintiffs obtained the judge's order for the enlargement, and never shewed any dissent to the arbitrator's proceeding upon it, but assigned another reason for their non-attendance at the time appointed for the meeting.

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TYLER *v.* JONES, T. T. 1824. K. B. 3 *B. & C.* 144; S. C. 4 *D. & R.* 740.

A REFERENCE to arbitrators contained two provisoes; first, That the death of either of the parties before the making of the award should not be a revocation of their authority; and, secondly, Giving them power to enlarge the time for making the award. It was holden, that the reference gave them incidentally the same power of enlarging the time after that event as before, and that an award made within such enlarged time was good.

And a power to make an award after the death of either party authorizes the arbitrator to enlarge the time after that event *.

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MASON *v.* WALLIS, M. T. 1829. K. B. 10 *B. & C.* 107; S. C. 5 *M. & R.* 85.

BY submission to arbitration under a judge's order, the arbitrator had power to enlarge the time for making his award to such day as he should appoint, in writing under his hand, to be indorsed on the order, "as the Court of King's Bench, or a judge thereof, should order;" the arbitrator made several enlargements, but no order of the Court, or of a judge, was obtained. On motion for an attachment,

But where the time is to be enlarged by order of the court †, or a judge, such order must be obtained; drawing up the rule merely incorporating original order will not suffice.

*Per Cur.*—We cannot presume that there were judges' orders allowing of the enlargements, merely because the rule has been drawn up incorporating the original order and the enlargements. If there were any such orders produced to the Court at the time, the rule would appear on the face of it to be drawn up on reading them, as well as on reading the original order and the enlargements. The award was therefore made without any authority.

* And the death of a party after "*publication*" is no ground for setting aside the award. This term means, such notice of the award as will enable the parties to obtain knowledge of its contents. (*Brooke* v. *Mitchell*, 6 M. & W. 473; S. C. 8 D. P. C. 392).

† Several orders for enlargement of time may be comprised in one rule of Court. (*Tribe* and *Upperton, In re*, 3 A. & E. 295).

GREIG *v.* TALBOT, T. T. 1823. K. B. 2 *B. & C.* 179; S. C. 3 *D. & R.* 446.

And a deed extending the time merely, in which an award is to be made, does not merge the original bond of submission.

IN debt, on bond, for performance of an award, it appeared, and was alleged in the declaration, that, before the time for making it expired, the parties, by deed, gave further time, within which the award was made. Upon demurrer, the Court held, that the legal effect of the second deed was not merely to give a remedy upon that deed, but to place the parties in the same situation as if the extended time had been introduced as a term in the original condition, and to vary the defeasance, only keeping the bond in force as a subsisting security.

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SALTER *v.* YEATES, M. T. 1836. Ex. 2 *M. & W.* 67; S. C. 5 *D. P. C.* 291.

A certificate may be made after the distringas is returnable, unless objected to at the time.

THIS cause was tried in Easter Term 1836, and referred to a surveyor, to certify for whom and for what sum a verdict should be entered. In October following the surveyor certified. It was contended, that the certificate was not made in time. The jury process was returnable in Trinity Term, and the cause was referred in the Easter vacation. The certificate was not given until the Trinity vacation. There was no order of Nisi Prius authorizing an enlargement of the time; and it has always been considered that a certificate must be made before the distringas is returnable.

*Per Cur.*—Here the writ of distringas was returnable a few days after the reference. It never could have been the intention of the parties that the arbitrator should have made his certificate within that time. We could not set this certificate aside without an affidavit that this objection was taken, and the plaintiff withdrew from the reference on that ground.

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TOMES *v.* HAWKES, E. T. 1839. K. B. 2 *P. & D.* 248; S. C. 10 *Ad. & E.* 32.

At the assizes, a cause was referred to the arbitrator to fix the amount of the verdict: he may do so after the assizes without an order of Nisi Prius.

AT the assizes, a cause was referred. A verdict, with the damages in the declaration, was entered for the plaintiff, with leave for the arbitrator to direct by this certificate what should be the amount of damages. No order of Nisi Prius had been made. The arbitrator had, since the conclusion of the assizes, made an order to alter the verdict from the amount of the damages in the declaration to that stated in his certificate, and the associate had since altered the verdict accordingly. On motion to set aside the certificate, on the ground that it was made too late, the Court refused to interfere.

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DODINGTON and HAILWARD, *In re*, T. T. 1839. C. P. 5 *Bing. N. S.* 591; S. C. 7 *D. P. C.* 640; S. C. 7 *Scott*, 733.

Although, in case arbitrators disagree, the umpire is to make his award by a certain day, still, if there be power to enlarge the time, an award made within

ARBITRATORS were empowered, by a submission-bond, to make their award before a certain day, or on such other day as they may fix; and, in case of their disagreement, to appoint an umpire, who shall determine the matters in reference by a day named, or on such other day as he shall appoint. The arbitrators, after the time named for making their award, but before the time given to the umpire expired, enlarged the time; and within that time the umpire enlarged the time.

*Per Cur.*—The terms of the reference are, that the arbitrators

should make their award on or before the 20th August, but that in case of their disagreement, or not agreeing, the umpire should have power to make his award before the 20th of September. Thus, therefore, the umpire had power; power was, in fact, given to each, separately and distinctly, to enlarge the time. First of all, as to the authority of the arbitrators, they not coming to an agreement, or agreeing, perhaps not to hear the case, enlarged the time to the 20th of September. The umpire was then called in to act and interfere directly, and he enlarged the time for another month, until the 20th October; each of them as if throwing his time forward a month beyond the other. The intention of the parties, as it appears to us to be collected from circumstances, and by plain intendment, was, that when the arbitrators found that there was no prospect of their agreeing within the time required, they, for the purpose of preserving the power, appealed to and called in the umpire; not that he should then transact or complete the whole business, but that he should enlarge the time to the 20th of October, for the purpose of coming to a decision.

the enlarged time by the umpire is good, though appointed after the arbitrators had enlarged the time for making the award.

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ANDERSON *v.* FULLER, M. T. 1838. Ex. 4 *M. & W.* 470; S. C. 7 *D. P. C.* 51.

THE arbitrator made his award on the 8th May, 1838, in favour of the plaintiff for the sum of 254*l.* 10*s.*, and the award, after reciting that the parties had requested the arbitrator to state the facts, proceeded accordingly to set forth the circumstances of the case, and concluded in these terms: That if, under the circumstances stated, the defendant is liable in law to those parts only of the plaintiff's demand, which arose out of the proceedings expressly directed by himself, then that the damages should be reduced to 125*l.* 17*s.* If the defendant is not liable in law for any part, then that the verdict should be for the defendant. In the following Trinity Term a motion was made to set aside the award. The rule was enlarged till this term, and discharged on the 5th of November. Judgment was entered up on November 10th; and on November 13th the defendant obtained a rule to shew cause why the verdict should not be entered for the defendant.

*Per Cur.*—This is in effect a motion to set aside the decision of the arbitrator. He has found that the verdict should be entered for the larger sum, unless the Court should interfere; but to procure that interference the application should have been made in the following term.

But where an award is made subject to the opinion of the court, the motion for that purpose must be made within the term next following.

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(*b*) FORM OF, AND STAMP ON.

MATSON *v.* TROWER, M. T. 1824. N. P. 1 *R. & M.* 17; *semb.* S. P. BOYD *v.* EMMERSON, M. T. 1834. K. B. 4 *N. & M.* 99; S. C. 2 *A. & E.* 184.

ARBITRATORS, disagreeing, appointed an umpire, who, after examining the parties, made his award in these terms, "I am of opinion that," &c.

*Abbot*, C. J., decided that the language of an award in framing it was immaterial, and, being in the form of opinion, did not invalidate it.

An award may be in the form of an opinion*,

* Or a certificate. (*Parke*, J.—*Jebb* v. *M'Kiernan*, Lent Assizes, 1829, N. P. 1 M. & M. 340).

LANCASTER *v.* HEMMINGTON, M. T. 1835. K. B. 5 *N. & M.* 538; S. C. 4 *A. & E.* 345.

and need not state to be founded on the facts therein contained.

AN action for negligence against an attorney was referred. The arbitrator made his award, reciting the order, and directing that the verdict should be entered for the defendant; and he adjudged, awarded, and declared, that it was proved before him that all the erasures and interlineations appearing in the conveyance were made before it was executed by any of the parties, and before livery of seisin made, and he awarded that the plaintiff should pay the defendant 10*l.* 10*s.* for his costs of the reference. On motion to set aside the award,

*Per Cur.*—We do not think that the arbitrator must necessarily be taken to have intended this statement as a statement of the grounds of his determination. We conceive that he may have had another object.

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HARDING *v.* FORSHAW, E. T. 1836. Ex. 1 *M. & W.* 415; S. C. 1 *Tyrw. & G.* 472; S. C. 4 *D. P. C.* 761.

It should, however, include all matters ripe for trial when the cause was referred.

AN action for work and labour, and for commission on the purchase of lands, was referred, and all other matters in difference, costs to abide the event, and judgment to be entered according to the award; and the arbitrator decided that the plaintiff had no cause of action, and that the plaintiff was indebted to the defendant in a certain sum, which he awarded to be paid, and declared that the award was not to preclude the plaintiff's right to certain commissions to which he would become entitled under a particular agreement. On motion to set aside the award,

The Court were of opinion that the arbitrator had no power to order how the verdict was to be entered; and that he could only deal with the matters ripe for trial when the cause was referred.

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LOCK *v.* VULLIAMY, M. T. 1833. K. B. 5 *B. & Ad.* 600; S. C. 2 *N. & M.* 336.

But "I propose that A. should pay B. 10*l.*," is not a binding award.

REFERENCE to arbitration. The arbitrator made no formal award, but wrote letters to A. and B., the parties, in which he says, "To meet the circumstances of the case, in a liberal manner, I propose that B. shall pay A. 10*l.*" It was contended that this was not an award.

*Per Cur.*—It is true no technical words are necessary if the opinion be expressed. But here it does not appear to us clear from the words that the arbitrator meant to say that the plaintiff was entitled to any thing. We do not think he could sue for the 10*l.* upon this award; therefore, we think this would *not* be an award which would bar the action without giving the plaintiff any thing for his services. We do not think that the arbitrator meant to conclude the parties by his suggestion.

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WOOF *v.* HOOPER, E. T. 1838. C. P. 4 *Bing. N. S.* 449; S. C. 6 *Scott*, 281; S. C. 6 *D. P. C.* 617, *by name of* WOOLFE *v.* COOPER.

Under authority to certify for whom and what

A VERDICT was taken for the plaintiff with 500*l.* damages, conditional upon the finding of an arbitrator, and under the order of Nisi Prius he was directed to make an award, or certificate *in* the

cause, and all matters in difference; and if he should find that the plaintiff was not entitled to recover any damages at all, then the above-named conditional verdict was to be void, and instead thereof, a verdict was to be entered for the defendant. The arbitrator found that nothing was due, and he directed a verdict to be entered generally for the defendant.

amount a verdict is to be entered, the certificate may follow the finding of the jury.

*Per Cur.*—A general verdict was taken for the damages in the declaration. In order to show that this was merely a formal entry, a general power is given to the arbitrator in reference to the whole cause. We think then that the whole cause is referred, and that the arbitrator is in the character of a jury.

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BOYD *v.* EMMERSON, M. T. 1834. K. B. 2 *A. & E.* 184; S. C. 4 *M. & M.* 99.

IN this case a question arose whether a counsel's opinion on a statement of facts, by which the parties concerned consented to be bound, required a stamp.

A mere opinion is not such an award as need be stamped*.

*Per Taunton*, J.—There are many cases in which parties agree to abide by the opinion of counsel. I never thought of stamping my opinion, given in such cases, as an award.

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STEPHENS *v.* LOWE, T. T. 1832. C. P. 2 *M. & Scott*, 44.

THE plaintiff and defendant, by bond, referred to arbitration the damages to be occasioned to the defendant, by the plaintiff's working a mine, which damages were to be assessed, and an award made every two months. The first award was regularly made, but the second was postponed for about six weeks beyond the following two months, when the arbitrator and parties attended to assess the damages; and on the bond was indorsed a memorandum, unstamped, that all parties had then met by consent on the award.

Where the time for making the award is enlarged by agreement the agreement must be stamped.

The Court said, That the memorandum indorsed on the bond being unstamped could not be given in evidence as an agreement.

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### (*c*) CONTENTS.

#### 1. *Must be in strict accordance with the submission.*

STEPHENS *v.* LOWE, T. T. 1832. C. P. 2 *M. & Scott*, 44.

THE plaintiff and defendant, by bond, referred to arbitration the damages to be occasioned to the plaintiff, by the plaintiff's working a mine, which damages were to be assessed, and an award made every two months; the first award was regularly made, but the second was postponed for about six weeks beyond the following two months. On motion to set the award aside—

The award must strictly pursue the submission, and accord with the time within which the award is to be made† ;

* A bond conditioned for the due discharge, by A. M., of the duties of clerk, provided that such discharge should be ascertained by the inspection of A. M.'s accounts by J. S.; and that the amount ascertained should be liquidated damages. A paper, by which J. S. has ascertained such amount, requires to be duly stamped as an award. (*Parke*, J.—*Jebb* v. *M'Kiernan*, M. & M. 340).

† But where, by agreement of reference, the arbitrator is to take a view previous to entering on the reference, and he takes such view, an omission to recite the fact is no objection to his award. (*Coleridge*, J.—*Spence* v. *Eastern Counties Railway Company*, T. T. 1839, B. C., 7 D. P. C. 697).

*Per Cur.*—Whether this award can be sustained under the terms of the submission-bond, by which it appears that the arbitrator was to assess the damages sustained by the plaintiff every two months? It has been contended that this condition is not imperative, and being for the benefit of the plaintiff, she is at liberty to waive it; but it is equally a condition for the benefit of the defendants, for it was important to them that the periodical assessment of damages should be made as soon as possible after the alleged injury, in order that they might not lose the evidence to shew the real state of the facts; and, as to the supposed difficulty of making the award at the precise moment, each two months should expire in this as in other cases, a reasonable time must be allowed for the duty to be performed; and what shall be a reasonable time must depend on the facts of the case and the judgment of the Court. Though it is not always easy to say what is a reasonable time, it is easy, as in the present instance, to say what is unreasonable; for, when the party has allowed a third month to elapse without requiring an assessment, and the award has included damages incurred subsequently to the second month, such an award is not within the condition of the bond, and therefore entirely void.

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HOOPER *v.* HOOPER, T. T. 1825. Ex. 1 *M. & Y.* 509.

and one larger than the submission cannot be sustained.

ACTION on a right of way claimed for carriages. At the trial that was abandoned, and limited to a footway, subject to the award of a barrister, to whom it was referred to settle all matters in difference between the parties, and to direct in what manner the road in question (if he should find for the plaintiff) should be enjoyed, &c. The arbitrator awarded that the plaintiff ought to be permitted, for himself and his servants on foot, and with his cattle and horses laden or unladen, either with crooks or in any other manner, or drawing in any cart or waggon or other carriage, or in any other manner, to go, return, pass, &c. On motion to set side the award, on the ground that the arbitrator had exceeded his authority in awarding that the road in question should be used with cattle and horses drawing in any cart or waggon or other carriage, because the arbitrator was not empowered to impose any burden on the defendant to which he could not have been subjected by the verdict—

The Court held, that the arbitrator had clearly exceeded his jurisdiction, and directed that the award should be set aside.

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PASCOE *v.* PASCOE, T. T. 1837. C. P. 3 *Bing. N. S.* 898; S. C. 5 *Scott*, 117.

Hence, an arbitrator cannot award a power to distrain unless the submission authorizes it.

IN replevin, an avowry stated a power of distress given by an award under an agreement entered into between the plaintiffs and the defendant, by which certain disputes and differences relative to a distress which had been then made, and an action at law then depending, and all other matters in difference between the parties, were submitted to arbitration. The plaintiffs pleaded, and the defendant replied as above; and the plaintiffs rejoined that the giving such power of distress was not a matter within the submission.

The Court held, that the arbitrator's authority to give the power of distress ought either to appear by the express words of the submission, or to be brought within the general words of it, by a dis-

tinct averment on the record, that the question as to the power of distress was one of the matters in difference between the parties to the submission.

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CRUMP *v.* ADNEY, H. T. 1833. Ex. 1 *C. & M.* 355.

THE submission to arbitration in this case was, that the arbitrator shall and may award the payment of an annuity to, &c., with a proviso for abatement in case of a deficiency of assets.

The Court held, upon a view of the context and circumstances, it was imperative on the arbitrator to insert such proviso in the award.

And where a submission is limited by a proviso, the award must be accordingly.

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HUTCHINSON *v.* BLACKWELL, E. T. 1832. C. P. 8 *Bing.* 331; 1 *M. & Scott*, 513; S. C. 1 *D. P. C.* 267—S. P. JACKSON *v.* CLARKE, H. T. 1825. Ex. 1 *M'Clell. & Y.* 200.

AFTER the cause had been entered for trial in the Common Pleas, a submission was entered into and made a rule of King's Bench to have the action, and the subject-matter thereof, the issue therein, and the costs of such action, referred to the award of a barrister, who directed that the verdict should be entered for the plaintiff for ——*l.*, and that the defendant should pay the costs of the cause:—The Court held, that the arbitrator had no authority to order the verdict to be entered, as the submission gave no such authority.

A reference "of the subject-matter of an action and the issue therein," does not authorize the arbitrator to direct a verdict to be entered up*.

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HAYWARD *v.* PHILLIPS, H. T. 1837. K. B. 1 *N. & P.* 288; S. C. 6 *A. & E.* 119.

TO an action of covenant by landlord against tenant, assigning several breaches, the defendant pleaded that the lease was obtained by fraud, and performance of the other covenants. A verdict was taken for the plaintiff on the first issue (as to the fraud), and damages assessed on the first breach (for non-payment of rent at 10*l.*), subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties was referred, to order what he should think fit to be done by the parties, and with liberty to amend the record, the issue not having been perfected on one of the pleas. The arbitrator directed that the verdict entered on the first issue should stand, and assessed the damages on the several breaches at 249*l.*, in addition to the 10*l.* found on the first breach; for which sum he directed the verdict to be entered for the plaintiff. On motion to set aside the award—

*Per Cur.*—It clearly appears that the arbitrator had no power given him by the order of reference to enter a verdict on the other breaches; and, therefore, the case is brought within the decision in *Donlan* v. *Brett*, 1 N. & M. 854; S. C. 5 A. & E. 344.

So, where there are several breaches, an authority to enter a verdict on first breach does not extend to the other breaches.

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THORPE *v.* EYRE, H. T. 1834. K. B. 3 *N. & M.* 214; S. C. 1 *A. & E.* 926.

IN an action on the case between landlord and tenant, founded upon a supposed illegal distress, the cause was referred, and the arbitrator directed that the tenancy should cease from the date of the

So, upon a mere reference as to an illegal distress, the arbi-

* Upon a submission, before trial, of matters, the arbitrator having awarded that a verdict should be entered for the plaintiff for a certain sum:—Held, that it was virtually an order to pay that sum, and sufficient. (*Cartwright* v. *Blackworth*, M. T. 1832, B. C., 1 D. P. C. 489).

trator cannot determine the tenancy or change the property*.

award, and that possession should be given within a month after, and possession accordingly taken; after which a creditor obtained judgment by default, and issued execution against the crops on the premises. On motion to set aside the award—

The Court were of opinion that the award could not change the property nor determine the tenancy; but that it was admissible in evidence upon an issue whether, at the time of the execution, the crops were the property of the tenant or landlord.

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LEEMING & FEARNLEY, *In re*, T. T. 1833. K. B. 5 *B. & Ad.* 403; S. C. 2 *N. & M.* 232—S. P. HUNT *v.* HUNT, H. T. 1836. K. B. 5 *D. P. C.* 442.

Nor can he award a "stet-processus" without express authority;

IN an action of replevin all disputes touching the distress and amount of rent were referred: costs to abide the event. The arbitrator awarded a "stet-processus." On motion to set the award aside—

The Court held, that he could not award a stet-processus, as it must appear by the award that the action is finally determined in favour of one of the parties; or else it cannot be ascertained how the costs are to go.

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BIRD *v.* COOPER, T. T. 1835. Ex. 4 *D. P. C.* 148.

but, in trespass for assault and taking goods after verdict—the claim being abandoned as to the goods—an award generally reducing the amount suffices.

BY an order of reference, after verdict in an action of trespass for taking goods, &c., with a count for assaulting plaintiff's wife, was referred, the dispute being as to the property in the goods; at the reference an assault was proved, and the plaintiff abandoned his claim to part of the goods, and the arbitrator merely directed the verdict for the plaintiff to stand, and the damages to be reduced to £—, and was silent as to the property in the goods. On motion to set aside the award—

The Court were of opinion that the right of property was not a question in difference between these parties, and that it could not be settled by the arbitrator; and that the dispute respecting the assault being settled by the arbitrator, that the defendants would have no difficulty, in case a future action should be brought against them, in pleading the award as an answer to such action.

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BURTON *v.* WIGLEY, E. T. 1835. C. P. 1 *Bing. N. S.* 665; S. C. 1 *Scott*, 610.

Under a submission as to which of two partners are to receive certain bills of costs, the arbitrator may award the names of both partners to be used in any action.

BY order of reference, at Nisi Prius, the arbitrator to settle all matters in difference between the partners A. and B., and to decide which of them should be entitled to receive certain bills of costs; the arbitrator awarded that the said B. should be at liberty to collect and retain on his own account all sums of money due for business transacted at the office, Essex-street, and to use the name of the said Wigley, either alone or jointly with his own, if necessary, in suing for the same. In an action on the award—

*Per Cur.*—The words of the order of reference are very large; and we do not see how the arbitrator can have exceeded his authority. How could the party get in the debts without being allowed to bring actions in the name of himself and Wigley? This is the construction which should be put upon the instrument, not alone

* So, where costs are to abide the event, the arbitrator cannot fix a sum for costs. (*Coleridge, J.—Kendrick* v. *Davies*, T. T. 1837, B. C., 5 D. P. C. 693).

from the good sense of the thing, but from its words, which are large enough to admit such construction with propriety.

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### 2. *Must be certain and intelligible.*

WYKES *v.* SHIPTON, H. T. 1834. K. B. 3 *N. & M.* 240.

An award substantially deciding the question in dispute, is sufficiently certain.

AT the trial, this cause was referred, that a verdict be entered for the plaintiff, damages 100*l.*, costs 40*s.*; and that the said cause, and also a certain indictment against the defendant for an assault, should be subject to the award of A. B., who was to order and direct that verdicts shall be entered therein as he should think proper; and, further, to direct what shall be done between the parties to secure the enjoyment of an exit for the smoke of their houses. The arbitrator, by his award, found that the plaintiff had no right to use the flue communicating with the defendant's premises, as an exit for the smoke from the fire in the plaintiff's shop; (in respect of an obstruction of which use by the plaintiff the action was brought); and therefore ordered the verdict entered for the plaintiff to be set aside. On motion to set aside the award—

*Per Cur.*—It is not necessary that he should find for the plaintiff or defendant in the very words of the issue; it is sufficient if he decide substantially the question in dispute.

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GILLON *v.* MERSEY NAVIGATION, E. T. 1832. K. B. 3 *B. & Ad.* 493; S. P. *In re* BROWNE & CROYDON CANAL COMPANY, H. T. 1839. Q. B. 9 *A. & E.* 522.

Where several matters are referred, the award need not specify for what the sum is awarded*.

THE submission recited disputes to have arisen between the plaintiff and a canal company, and that an action had been commenced in Scotland for recovery of the value of goods alleged not to have been delivered by the company and costs incurred, and that it had been agreed to refer the said differences, and the costs of the reference and of the suit to be in the discretion of the arbitrators; they directed, by their award, that a certain sum was due to the plaintiff, and that such sum, with 30*l.*, the costs of the reference, should be paid to him on a certain day; and that the company should keep the goods which were then in their possession.

The Court held the award sufficient, although it did not specify the matters in respect of which that sum was awarded, and that it must be taken to include the costs in Scotland; and the direction as to the goods, not an excess of authority.

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SNELL *v.* BURNE, M. T. 1835. K. B. 5 *N. & M.* 645.

And where a question of arrest, under 43 Geo. 3, is referred, the arbitrator need not say for what amount.

BY order of Nisi Prius, a cause in which the defendant had been held to bail for 52*l.* was referred to an arbitrator, to whom also the question of costs generally and of costs under 43 Geo. 3, c. 46, was referred. The arbitrator certified that 15*l.* 17*s.* 1*d.* was due to the plaintiff at the time when he held the defendant to bail, and

* But if the arbitrator is to find the true damages, and there be other matters than those in the cause, an entire sum cannot be awarded: the arbitrator should adjudicate upon them distinctly. (*Coleridge*, J.—*Gyde* v. *Boucher*, T. T. 1836, K. B., 5 D. P. C. 127).

that the verdict should stand for that amount; and that the plaintiff had reasonable and probable cause for causing the defendant to be arrested and held to bail; and he directed that the defendant should pay the costs of the action, and that each party should pay his own costs of the reference. On motion to set aside the award, on the ground that the arbitrator had not directed whether the plaintiff had reasonable and probable cause for arresting for 52*l.*—

The Court held the award sufficient.

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CAYME *v.* WATTS, H. T. 1823. K. B. 3 *D. & R.* 224.

So, an award directing a verdict to be entered without stating the sum, is good.

DEBT on bond; plea of payment by a third person; the cause and all matters in difference being referred under an order of Nisi Prius, the arbitrator directed the verdict to be entered for plaintiff generally.

The Court, without any affidavit that there were other matters in difference besides what appeared upon the record, refused to set it aside, although the arbitrators had not specifically decided in what sum judgment should be taken.

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PLUMMER *v.* LEE, E. T. 1837. Ex. 2 *M. & W.* 495; S. C. 5 *D. P. C.* 755.

So, an award of interest from the last settlement of accounts;

IN debt on an award the declaration alleged a previous and last settlement of accounts, and that the arbitrator had awarded a sum with interest from the said last settlement. It appeared that the date of such settlement was not disputed.

*Per Cur.*—If the time of the last settlement mentioned in the award was uncertain or matter in dispute, the award would have been bad. But it appeared distinctly in proof that the time of the last settlement was certain, and was not a matter in dispute between the parties, but was mutually agreed on by them.

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EARDLEY *v.* STEER, T. T. 1835. Ex. 2 *C. M. & R.* 327; S. C. 4 *D. P. C.* 423.

or, an award that the plaintiff's action shall cease, and that the plaintiff shall pay to the defendant a certain sum found due on the balance of accounts;

THIS action was referred to arbitration, the costs of the action, of the reference, and of the award to abide the event of the award. The arbitrators awarded that the action should cease and be no further prosecuted; and that, on the balance of the accounts exhibited to them, there was due from the said plaintiff to the said defendant the sum of 66*l.* 14*s.* 11*d.*, and that the plaintiff should pay that sum to the defendant.

*Per Cur.*—All matters in difference were referred, and the award directs that the suit shall be no further prosecuted, and that the plaintiff shall pay a sum of money to the defendant. Can we intend that was anything but the balance of the legal demands of the parties, since it does not appear that there was any demand of an equitable nature existing between them? We think they have directed the suit not to be prosecuted because the plaintiff has no cause of action.

DICKINS *v.* JARVIS, E. T. 1826. K. B. 5 *B. & C.* 528; S. C. 8 *D. & R.* 286.

A CAUSE and all matters in difference between plaintiff and defendant were referred by order of Nisi Prius; the arbitrator awarded that there is nothing due to the plaintiff.

or, an award that there is "nothing due to the plaintiff;"

The Court held that the award was sufficient, and determined the right of action between the parties.

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HALLYAR *v.* ELLIS, M. T. 1829. C. P. 6 *Bing.* 225; S. C. 3 *M. & P.* 553.

BY order of Nisi Prius, all matters in difference between the parties were referred to an arbitrator. He awarded as follows:—Of and concerning the said matters in difference between the said parties, that the said plaintiff had no cause of action against the defendant, and that the said plaintiff should pay the costs of the reference and award.

or, "no cause of action;"

The Court thought, that as all matters in difference between the parties were referred to the arbitrator, and as he professed to award "of and concerning the said matters in difference," the award was sufficiently comprehensive.

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DUCKWORTH *v.* HARRISON, M. T. 1838. Ex. 7 *D. P. C.* 71.

IN this case several issues were referred. The arbitrator awarded that the plaintiff had not, at the commencement of the action, or at any time afterwards, any cause of action against the defendant. In an action on the award there was a demurrer; and, after argument—

and this suffices unless requested to find each issue;

*Per Cur.*—We have taken time to consider our judgment, and have finally come to the conclusion, that if it was intended that the arbitrator should find distinctly upon each issue, he ought to have been requested so to do. The arbitrator has determined the action by saying that the plaintiff had no right of action at all.

*See* 4 *D. P. C.* 129; 2 *C. & M.* 722.

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PEARSE *v.* PEARSE, E. T. 1829. K. B. 9 *B. & C.* 484; S. P. REEVES *v.* M'GREGOR, H. T. 1839. K. B. 1 *P. & D.* 372.

BY order of Nisi Prius there was a submission by the parties in the cause, and a third party consenting to be a party of all matters in difference at law and in equity, the arbitrator adjudicated upon the suit at law by ordering the payment, by the defendant, of a certain sum, and of a suit in equity by ordering the bill to be dismissed, and each party to pay his own costs; and it did not appear that there was any matter in difference between the parties in the cause and such third party not included in the suit in equity—

or, an award upon an action at law and a suit in equity, and that there was no other matter in difference;

The Court held, that the award was a final determination of the latter.

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LOVE *v.* HONEYBOURNE, M. T. 1824. K. B. 4 *D. & R.* 814.

UPON reference of a cause, in which plaintiff sued as executor, and the arbitrator awarded a sum to be paid by him, on a day named, out of the assets in his hands as executor—

or, an award against an executor who submitted to arbitration, directing him to pay "out of the assets in his hands," is sufficient.

The Court held, that it sufficiently ascertained the plaintiff's liability, although it might not conclude him from raising the question, whether he had assets or not to pay.

KING *v.* EARL OF DUNDONALD, E. T. 1837. Ex. 5 *D. P. C.* 589.

So, an award for plaintiff as to residue, is not uncertain.

DECLARATION for goods sold. Plea—as to 30*l.*, parcel, &c., payment in satisfaction. Replication—that the sum was paid for another cause of action, and traversing the acceptance of it in satisfaction of the sum mentioned in the declaration. The cause being referred, the arbitrator found as to 3*l.*, parcel of the sum in the plea mentioned for the defendant, and for the plaintiff as to the residue.

The Court held, that the arbitrator finding 3*l.* for the defendant and for the plaintiff the residue, must be considered an award for the plaintiff for 27*l.*

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WOOD *v.* WILSON, E. T. 1835. Ex. 2 *C. M. & R.* 241.

And, under a power to arbitrator to divide partnership effects, it seems he may award the whole of entire chattels to one of them.

AN award recited that the parties had been in partnership as builders, and that disputes had arisen and were depending touching their accounts, reckonings, and dealings, and as to the division of certain partnership messuages and buildings of which they were possessed; and that they had agreed to refer them to arbitration, and that the arbitrators should have power to direct a division of the said messuages and buildings, and that each had agreed to execute to the other a conveyance of the messuages according to such division as the arbitrators should award. The arbitrators then awarded that the defendant should pay a sum to the plaintiff, in full of all demands, in respect of a moiety of the partnership property, estate, and effects, and that the plaintiff should execute a conveyance of his interest in the partnership buildings, which the defendant should take charged with two large mortgages; and that all debts owing to and by the partnership should be paid and received by them in equal moieties, and if one advanced more than the other he should be reimbursed.

In assumpsit for the sum awarded to be paid—plea, after setting out the award and pleading that the premises directed to be conveyed were the whole of the co-partnership premises, &c., and that the award contained no other provision as to the partnership property or the division thereof. On demurrer, it was contended that the award was not final; that it was uncertain and inconsistent, and that the arbitrators had not properly pursued their authority in describing the purchase by one partner of the whole instead of making a division.

But the Court held, that the award was sufficiently certain, and not inconsistent, and that the action was maintainable.

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PLATT *v.* HALL, E. T. 1837. Ex. 2 *M. & W.* 391; S. C. 5 *D. P. C.* 583.

And an award that verdict is to be for the plaintiff, but the defendant is to set off a named sum, is good.

A VERDICT was taken for the plaintiff for 2000*l.*, subject to a reference of all matters in difference to an arbitrator, who had power to set aside the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand 90*l.* of the defendant; and the defendant was entitled to set off 30*l.*, in respect of journies, &c., in his plea and notice of set-off, and that he should deliver up certain securities to the plaintiff.

*Per Cur.*—The arbitrator has settled all the pecuniary demands at once, and all that remains to be done is to deduct 30*l.* from 90*l.* He has ascertained, with sufficient certainty, what sum the plaintiff is entitled to recover.

DIBBEN *v.* MARQUIS OF ANGLESEY, E. T. 1834. Ex. 2 *C. & M.* 722; 10 *Bing.* 568; S. C. 4 *Tyrw.* 926.

So, in trespass, where there are justification of rights of common; award that the defendants were not guilty of the trespasses is good.

IN actions of trespass, to which the general issue, and pleas, justifying, under rights of common, were pleaded, and the actions were referred; costs to abide the event; and the arbitrator found that the defendants had not been guilty of the trespasses. On motion to set aside the award, it was not shewn that the arbitrator had been required to investigate the truth of the pleas of justification.

The Court decided that, except with reference to the costs, any inquiry as to the truth of the special pleas was immaterial; and it not appearing that he had been required to decide upon them, he had substantially disposed of the matters referred to him, and refused to set aside the award.

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DAY *v.* BONNIN, M. T. 1836. C. P. 3 *Bing. N. S.* 219; S. C. 3 *Scott*, 597.

And under a submission of "all matters in dispute," an award of a sum in satisfaction of all demands in the cause is sufficient, though the award does not negative there were other matters in difference*.

AFTER declaration, the cause was referred, and the arbitrator made his award, that, having heard, considered, and examined the allegations, proofs, and answers of both the parties, touching the matters in difference between them, and having thoroughly considered the same, do thereupon award, adjudge, and determine, that all further proceedings in the said cause shall from henceforth cease, and be no further prosecuted; and that the defendant shall and do pay the sum of 11*l.* 5*s.* of lawful money in full of all demands in the said cause.

*Per Cur.*—The arbitrator here has indicated, with a sufficient degree of certainty, that he has taken into his consideration all the matters in difference between these parties, and has, in point of fact, awarded upon them all. He has not, it may be admitted, in words negatived the whole; he has apparently confined himself to the subject-matter of the cause, but he has in substance negatived all. It is impossible to look at the award without seeing what the intention of the arbitrator was.

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WRIGHTSON *v.* BYWATER, H. T. 1838. Ex. 2 *M. & W.* 199; S. C. 6 *D. P. C.* 359.

And where actions at law and suits in equity were referred, "with liberty to the arbitrator to make one or more awards;" the arbitrator made an award, without mentioning the

AN action of trespass, and all matters in dispute at law or in equity, were referred to the arbitrator, to order and determine what he shall think fit to be done by either party respecting the matters in dispute, who agree to be bound and concluded by such determination, and to remain contented and satisfied therewith. After fixing a time for making the award, and stating that if either of the parties should be dead before it was made, it should be delivered to their respective personal representatives who should require the same, and giving the arbitrator a discretion over all costs but those of the cause; and, speaking of other usual provisions, it contained

* On submission of a cause and all matters in difference between the lessor and lessee, the costs to abide the event, an award, that certain fixtures have been wrongfully removed by lessor to the value of 11*l.*, and the lessee shall set up others in their places, to be left for the lessor at the end of his term, and that lessor shall pay lessee 11*l.* on a specified day, is bad, for uncertainty, in not specifying the value, quality, and description of fixtures to be set up by the lessee. (*Price* v. *Popkin*, 10 A. & E. 139; S. C. 2 P. & D. 304).

Chancery suits —held he had the power to do so.

the following words: "and the said arbitrator is at liberty to make one or more awards at his discretion." The arbitrator made an award in which he did not mention the Chancery suits. Upon motion to set aside the award, as not being final, the Court held, that it was a question of construction upon the terms of the order of reference, whether it was necessary to the validity of any award made pursuant to it, that it should decide all the matters in dispute, and that, by the terms used here, the parties had given the power to the arbitrator to dispose of all matters, but had not made it a condition that all matters should be disposed of by him.

*See Reeves* v. *M'Gregor*, 1 *P. & D.* 372.

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SMITH *v.* FESTINIOG RAILWAY COMPANY, M. T. 1837. C. P. 4 *Bing. N. S.* 23; S. C. 6 *D. P. C.* 190; S. C. 5 *Scott*, 255.

So, where one breach two pleas, an award of separate damages for plaintiff on each plea, the award is good.

A DECLARATION for not paying for certain works contained several counts, but only one breach. Pleas, first, The non-performance of the work in the manner alleged; and, secondly, that they had paid the instalments. The cause was referred; and the arbitrator, in his award, directed that a verdict should be entered for the plaintiff on both issues; on the first issue with 1*s.* damages, and on the second with 13*s.* 4*d.* damages. It was contended that the award was uncertain; for the first two issues were on one breach, and the arbitrator therefore should have directed the verdict to be entered with reference to the breach, and not with reference to the issues. But the Court overruled the objection.

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TAYLOR *v.* SHUTTLEWORTH, H. T. 1840. C. P. 8 *D. P. C.* 281.

And an award, where an action and all matters in difference are referred, is not bad for not distinguishing the sum awarded, as to what applies to the action, and what to the matter in difference.

THE plaintiff and defendant entered into an agreement, by which the former was to sell to the latter all his interest, right, benefit, &c. in certain patent pin machinery, and in the leases of various premises, tenements, &c., for the sum of 3500*l.*, (the payment of which, at two instalments, was to be secured by a warrant of attorney,) and an annuity of 300*l.*, payable by four equal payments, at certain periods in each year; such annuity to be secured upon property of simple value, to the satisfaction of the plaintiff's solicitor. In an action against the defendant for a breach of the agreement, in not paying the 3500*l.* by instalments at the appointed time, for a quarter's arrear of the annuity, with interest, and for not giving security for the annuity, in which a verdict was taken for the plaintiff for 10,000*l.*, subject to a reference, under an order of Nisi Prius, which authorized the arbitrator to settle the cause, and all matters in difference between the parties, and required the defendant to pay to the arbitrator, by a certain day, the sum of 3500*l.* on account, to be paid out by him to such of the parties as he might think fit; if the money were not paid, judgment to be signed for the damages in the declaration and execution to be sued out for the sum really due, &c. The arbitrator, after stating that the sum of 3500*l.* was lodged in his hands by the defendant, awarded that a verdict should be entered for the plaintiff on the issues found in the cause, and that he had sustained damages by reason of the premises set forth in the pleadings, and of the other matters in difference, to the amount of 6067*l.*, and that the sum of 3500*l.* deposited with the arbitrator should be paid to the plaintiff on account of the damages, and that the balance should be paid by a certain day; that the de-

fendants should pay all costs, and, upon payment of damages and costs, the plaintiff should assign to the defendant all his interest in the pen machinery, utensils, leases, &c., and should also make to the defendant a release of the annuity, and also of all arrears of the annuity, and extinguish the same, and give a release of all claims whatever, up to the date of the order of reference:—Held, that such award was good and valid, under the order of Nisi Prius, and could not be set aside.

*See Martin* v. *Burge*, 4 *A. & E.* 973; *Doe* v. *Horner*, 8 *A. & E.* 235.

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ROBINSON *v.* HENDERSON, M. T. 1818. K. B. 6 *M. & S.* 276.

But an award, directing certain sums to be paid to the arbitrators *and* an attorney, must state what amount to each.

ARBITRATORS awarded that a certain sum was due from the defendant to the plaintiff, and that out of such sum the defendant should pay to the arbitrators £——, being the expenses of preparing the agreement of reference and of their award, and should pay certain costs, which they did award to be paid to the plaintiff's attorney for costs of the action:—Held bad, for not specifying the particular sum to be appropriated to each object, and for including an indefinite allowance to themselves.

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WYKES *v.* SHIPTON, H. T. 1834. K. B. 3 *N. & M.* 240; S. C. 8 *A. & E.* 246, *n.*

And the want of assessment of damages;

TRESPASS—plea, general issue and justification; replication, de injuriâ, and new assignment, upon which judgment by default. Upon a reference, the arbitrator awarded a verdict for defendant, without giving damages, upon the new assignment. On motion to set aside the award, it was contended, that the jury were impannelled as well to try the issues as to assess the damages upon the new assignment, that is, all referred to the arbitrator. Is there, then, a final end and determination put to the cause by the award, which omits to take any notice of the judgment by default? Until a jury, or the arbitrator, (who is put in the place of a jury), find what damages have been sustained, the Court are not in a situation to give judgment upon the whole case; the defence, in truth, only goes to part of the declaration, and the other part is undefended. And of that opinion were the Court.

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*Ex parte* ROBSON, H. T. 1831. K. B. 1 *B. & A.* 723.

or not noticing an undisputed claim brought before the arbitrator;

UPON a reference of all matters in dispute, a demand and cross demand for goods was laid before the arbitrators, which were not disputed, but a balance immediately admitted as correct, and the arbitrators did not take it into their account, but laid it out of their consideration.

The Court held, that having been once presented as a claim it was a matter in difference, and the award therefore bad, as not being final.

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MORRIS *v.* DANIEL, E. T. 1834. C. P. 10 *Bing.* 507; S. C. 4 *M. & Scott*, 383; S. C. 2 *D. P. C.* 798.

or an award only comprehending five counts out of eight is bad;

THIS was an action on the case for disturbance. The declaration contained eight counts. At the trial the cause was referred; the costs to abide the event. The arbitrators found that the plaintiff

had a good cause of action on five out of eight counts; that the defendant should pay 5*l.* damages, and that no further proceedings should be had in the action:—Held, that there was no award as to three counts, no event to authorize the taxation of costs on those counts, and consequently that no part of the award could be sustained.

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SAMUEL *v.* COOPER, H. T. 1835. K. B. 4 *N. & M.* 520; S. C. 2 *A. & E.* 752.

nor can the arbitrator award that the matters in difference were not in the cause referred.

IN this case the arbitrator, upon a reference of all matters in difference in the cause between the parties, after reciting in his award that the plaintiff claimed certain sums, as matters in difference in the cause, declared and determined that they were not matters in difference in the cause. It appeared, however, that the items were claimed in the particulars, and also before the arbitrator.

The Court held, that all matters in difference in the cause having been referred to the arbitrator, there were some matters in difference upon which he had not come to any conclusion, and therefore that the award must be set aside.

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MARTIN *v.* BURGE, E. T. 1836. K. B. 4 *A. & E.* 973; S. C. 6 *N. & M.* 201.

And, where a verdict and other matters are referred, a general sum cannot be awarded.

A VERDICT was taken for the damages in the declaration, subject to be reduced upon a reference of all matters in difference between the parties, and the arbitrator awarded that the verdict should stand for the plaintiff, and that the defendant should pay a certain sum to him. It was contended, that the award was bad, for uncertainty, as whether the sum applied to the verdict in the action, or the other matters in dispute did not appear; and of that opinion were the Court.

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RIDER and FISHER, *In re*, T. T. 1837. C. P. 3 *Bing. N. S.* 874; S. C. 5 *Scott*, 86.

So, under a reference of a building contract of all alleged defects and imperfections, and as to extra work, a gross sum cannot be awarded.

DISPUTES as to a building contract, with respect to defects and imperfections, and extra work, and other things not done, in pursuance of the contract, were referred to an arbitrator, who was to award and determine "of all such alleged defections and imperfections." The arbitrator awarded the payment of a gross sum to the builder, without any decision as to the defects and imperfections, or what he had awarded in respect thereof. On motion to set aside the award, the Court held it insufficient.

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TRIMINGHAM *v.* TRIMINGHAM, E. T. 1835. K. B. 4 *N. & M.* 786.

An award of general releases implies that all the accounts are settled.

ALL matters in dispute were referred to an arbitrator. He awarded that a certain sum was due from A. B. to C. D., and directed that general releases should be executed by both parties.

The Court said, as the award orders general releases, every thing, therefore, which might have been gone into under that reference must be taken to have been decided on.

SALTER *v.* YATES, M. T. 1836. Ex. 2 *M. & W.* 67; S. C. 5 *D. P. C.* 291.

IN assumpsit for work and labour on a builder's bill, the amount claimed by the particulars was 104*l.* 12*s.*, to which the defendant pleaded payment as to 30*l.*, and brought into Court 45*l.* The cause being referred to a party to certify for what amount the verdict was to be entered, and who certified that 74*l.* was a fair and proper sum to be paid to the plaintiff, the associate entered a verdict for him.

A defendant pleaded payment of 30*l.* and paid 45*l.* into Court. A certificate, that plaintiff is entitled to 74*l.* for his work, is a finding for the defendant.

On a rule to shew cause why the verdict should not be entered for the defendant, the Court were of opinion that the arbitrator meant that defendant had paid enough, and therefore defendant was entitled to the verdict.

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### 3. *Must be Final.*

TOLLIT *v.* SAUNDERS, M. T. 1820. Ex. 9 *Price*, 612.

SUBMISSION to arbitration of several matters, with power to the arbitrators to choose an umpire; upon some of which the arbitrators met, and decided and referred a particular point to an umpire, who was stated, by indorsement on the bond, to have been chosen by them to decide between themselves, and the award was subsequently made by all, reciting the reference to, and decision of, the umpire on that point.

Arbitrators cannot determine on one point and refer another to an umpire, unless sanctioned by the terms of the submission*.

The Court held, that the award was bad; the intention of the submission being clearly that the arbitrators should make their award upon the whole matters; and, if they could not, the umpire should.

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ROSS *v.* BOARDS, T. T. 1838. Q. B. 3 *N. & P.* 382; S. C. 8 *A. & E.* 290.

ACTION on an agreement to purchase, the title not proving satisfactory. At the trial, the action, and all matters in difference between the parties, and the settlement of all questions on the agreement, were referred. The arbitrator awarded, that the defendant should convey to the plaintiff the title contained in the abstracts of title produced in evidence before him to the piece of ground specified in the agreement; and he awarded also, that the defendant should execute a bond to indemnify against any defects of title in the said agreement.

And, where a dispute as to the validity of a title was referred, the arbitrator having ordered an indemnity bond, held bad.

The Court held the award bad, not deciding the point referred; and for excess, as such bond was not authorized by the submission.

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TRIBE and UPPERTON, *In re*, E. T. 1835. K. B. 3 *A. & E.* 295.

UPON an agreement for the purchase of a business, a suit was afterwards instituted for rescinding the agreement, and an injunction obtained; the whole matters were referred to an arbitrator, who, after deciding and directing as to many parts of the agree-

And, where an agreement is referred, the arbitrator awards as to

* So, if an arbitrator, after adjudicating on the subject-matter referred to him in its present state, goes on and regulates prospectively on the same subject-matter reduced to a different state, and thereby in some degree altered; quære, whether that be a proceeding beyond his authority? (*Winter* v. *Lethbridge*, 13 Price, 533; S. C. 1 M'Clel. 253).

many parts of it, but does not finally dispose of the whole, the award is bad.

ment, directed certain things to be done, the performance of which was to be taken in full satisfaction of all the matters in difference. He also awarded, that each party should bear his own costs of the Chancery suit; but he made no further order as to the suit, nor did he direct that the agreement should be rescinded. And, upon motion to set aside the award for these omissions, it became a question whether or not the arbitrator had fully decided upon all the matters of the agreement.

Held, that the award was bad, inasmuch as it neither ordered the agreement to be rescinded, nor clearly determined all the matters connected with it, nor did it put an end to the Chancery suit.

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STONE *v.* PHILLIPPS, M. T. 1837. C. P. 4 *Bing. N. S.* 37; S. C. 3 *Scott*, 275; S. C. 6 *D. P. C.* 247—S. P. *Ex parte* ROBSON and RAILSTON, H. T. 1831. K. B. 1 *B. & Ad.* 723.

So, where an action is referred, and "all matters in difference," and another action not referred forms part of the dispute, of which the arbitrator had notice, and awards, without mentioning it.

FOUR actions were referred to an arbitrator, to adjudicate upon all matters in difference between the parties. The award was accordingly made, in which the arbitrator directed certain results as to the subject-matter of the four actions; and also, that upon the performance of the award, the respective parties to the actions, which had been referred, and all persons who became parties to the reference, should, upon being required, execute good and sufficient releases of all actions, claims, and demands, touching any matter which was the subject of any of the actions referred, or any claim or dispute concerning any title, to any of the premises mentioned, down to the day of the date of such order. The arbitrator was informed that an action was brought against one of the litigating parties, which was still pending, and that the subject of such action was one of the matters in dispute, but he made no adjudication, and came to no decision upon it.

On motion to set aside the award, the Court made the rule absolute, saying, "How can we say that this is a good award, one of the conditions on which it was founded, namely, that all matters in difference should be decided, not being fulfilled?"

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WOOD *v.* DUNCAN, M. T. 1838. Ex. 7 *D. P. C.* 91.

So, where there are several issues, and the arbitrator finds some for the plaintiff and others for the defendant, which do not go to the whole cause of action, and does not award damages.

BY order of Nisi Prius, a cause was referred. The declaration and pleas raised seven issues. The arbitrator found for the defendant on two of the issues, neither of which covered the whole cause of action, and for the plaintiffs on the others, but omitted to award damages. On motion to set the award aside—

*Per Cur.*—The arbitrator has not stated whether the verdict should be entered for the plaintiffs or the defendant; and, if for the plaintiffs, to what damages they are entitled. This is the more necessary as the costs are to abide the event; and it is impossible to say, on this award, in whose favour judgment ought to be entered.

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GISBORNE *v.* HART, E. T. 1839. Ex. 5 *M. & W.* 50; S. C. 7 *D. P. C.* 402.

And where there are two counts, the

UPON a reference of an action on a promissory note, and on an account stated, to which the pleas were, as to the first count, fraud and covin; and, as to the second, non-assumpsit; the arbitrators

found that the plaintiff had good cause of action for, and was and is legally entitled to have claim and recover the sum of, &c., being the amount of the promissory note mentioned in the pleadings.

Held, that the award was bad, as not disposing of both the issues.

award must dispose of both.

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BROWN and the CROYDON CANAL COMPANY, *In re*, H. T. 1839. K. B. 1 *P. & D.* 391.

S. B. agreed to sell an engine, called a Gas Vacuum Engine, to the Croydon Canal Company, and undertook to work it, and keep it in repair for fourteen years, they paying him 300*l.* for it, and 100*l.* a-year for the working of it. If it would not answer it was to be returned by the Company, and removed by S. B., who was, however, to have full liberty of shewing the engine. In case of any dispute arising, the same was to be referred to arbitration. Disputes did arise between S. B. and the Company, as to certain sums claimed by him as due from them under the agreement, and also for certain sums for compensation claimed by him in consequence of the said Company having put an end to the agreement, and as to a set-off claimed by the Company. Bonds were accordingly executed, by which it was recited that certain disputes and differences had arisen; and those disputes, as well as all other matters and damages heretofore done, committed, or pending between the said parties, were referred to two arbitrators and an umpire. The arbitrators met, and the reference was entered upon, when S. B. made a claim, including, among others, a demand for eight years' payment of the stipulated salary of 100*l.* a-year for the remainder of the term; and also a further demand for prospective damages which he expected to sustain by reason of the Company having put an end to the agreement, and evidence was produced on both sides in respect to those claims. The Company also claimed two sums by way of set-off, and gave evidence in support of their claim to one, the other being admitted. The arbitrators made their award, which, after reciting the bonds of submission, concluded as follows:—Having fully heard and maturely considered all the evidence produced by and on behalf of each of the said parties in difference, and having carefully investigated and examined all the accounts and vouchers produced before us, touching the matters in difference, and to us referred in manner aforesaid, do award that there is justly due and owing from the said Company to the said S. B. the sum of 515*l.* 16*s.* 7*d.* And we do order and award the said Company to pay the said sum of 515*l.* 16*s.* 7*d.* to the said S. B.; and we award that the costs of the reference and the award shall be paid by the said Company. On motion to set the award aside—

The Court held, that the award was good, though it did not specify how much had been allowed for the debt, and how much for the damages, or whether the set-off had been allowed or not.

But where on a reference a party claims a debt, and also contingent damages, and the other claims a set-off, a general award of £—, due from the latter to the former, may be supported.

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SAVAGE *v.* ASHWIN, M. T. 1838. Ex. 4 *M. & W.* 530.

THIS cause was referred at Nisi Prius to a barrister, and the costs of it were to abide the event. The arbitrator awarded in favour of the plaintiff on part of the first and second issues, without damages; in favour of the defendant, upon a plea which covered the whole cause of action. On motion to set aside the award—

Where a plea goes to the whole, and there are other issues, and the arbitrator gives

an award for the defendant on that plea, and for the plaintiff as to the other issues, without damages, it is good.

The Court said, as there was a plea that covered the whole cause of action, upon which the arbitrator had found in favour of the defendant, the objection was untenable.

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4. *Should not be inconsistent with Law.*

MORLEY *v.* NEWMAN, M. T. 1824. K. B. 5 *D. & R.* 317.

An award that A. should not set up in trade within thirteen miles of B. is legal.

TWO partners, as surgeons, referred all matters in dispute between them, and the terms on which the partnership should be dissolved, to arbitration. The arbitrator having awarded that one of them should not act as such during the life of the other within thirteen miles of the place wherein they resided—

It was holden, that the award was good, inasmuch as the arbitrator had power to impose such condition.

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PAYNE *v.* MASSEY, M. T. 1824. C. P. 9 *Moore*, 666.

So is an award to pay interest not recoverable at law.

THE submission referred to arbitrators matters of fact as well as law, the award was silent as to the grounds on which the arbitrators made their award.

The Court refused to interfere, unless the principles on which they decided appeared on the face of the award itself, as it only appeared from the sum awarded that they had allowed interest which was not recoverable at law.

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THORPE *v.* EYRE, H. T. 1834. K. B. 3 *N. & M.* 214.

But, on a reference between landlord and tenant, the arbitrator cannot make an award determining the tenancy.

IN an action between A., tenant of Whiteacre, and B., his landlord, all matters in dispute were referred to C., who was to determine what should be done with respect to the land. C. awarded, with respect to the land, that, from the date of his award, the tenancy should cease, and that A. should, within a month, deliver up possession to B. Possession was taken accordingly. D., a creditor of A., afterwards issued execution against A., and took the crops growing on Whiteacre.

The Court held, that this award did not determine the tenancy.

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PRICE *v.* POPKIN, E. T. 1839. K. B. 2 *P. & D.* 304; S. C. 10 *A. & E.* 139.

Where an action of covenant is referred, an award that certain fixtures shall be re-instated cannot be sustained.

MOTION to set aside an award. The action was covenant by a tenant against his landlord for not putting the demised premises into repair before the commencement of the term of twenty-one years demised, and not keeping them in repair. Pleas, non est factum, performance, and that the plaintiff, of his own wrong, used the premises in an improper and untenantlike manner as to cause the damage complained of. The cause and all matters in difference having been referred, the arbitrator awarded a sum for damages; reciting that the parties, among other matters in difference, had referred it to him to adjudge whether certain gates, locks, bolts, and fastenings were part and parcel of the premises demised by the defendant to the plaintiff; and further, to order and adjudge what should be done to make a final end and determination of such matters in difference. He awarded that the fixtures in question were part

of the demised premises, that they had been removed by the plaintiff, and applied to his own use, and that the plaintiff should "fix and set up other gates, bolts, and fastenings, in the place of such as were removed."

*Per Cur.*—The award is bad. The arbitrator has exceeded his authority, as given by the terms of the reference, by ordering the replacing of these fixtures, nor is the award sufficiently certain.

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5. *Should not require an Act to be done by a Stranger.*

TOMLIN *v.* MAYOR OF FORDWICH, T. T. 1836. K. B. 5 *A. & E.* 147; S. C. 6 *N. & M.* 594.

An award that premises are to be repaired to the satisfaction of a surveyor*;

IN covenant on an award, it appeared that certain differences as to the terms on which a lease should be renewed by a corporation to their lessee, and also as to the boundaries of property held under the lease, were referred to two arbitrators, who awarded that the corporation should put the premises in good tenantable repair to the satisfaction of one J. S., a builder, and should grant a lease of the premises at a certain rent, which should contain covenants to keep the premises (having been first repaired by the lessors as aforesaid) in good repair.

*Per Cur.*—The award is bad. The arbitrators had no power to order a certain thing to be done to the satisfaction of some third person.

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TURNER *v.* SWAINSON, T. T. 1836. Ex. 1 *M. & W.* 572.

or in trespass, that a stile and bridge shall be put upon the land of a third party, is bad.

AN action of trespass was referred. And the arbitrator was to determine the cause and all matters in difference, and to say what was right to be done between the parties. He proceeded and made his award, in which he directed that the verdict, which had been entered for the plaintiff, should be set aside and a verdict entered for the defendant; that the plaintiff should remove all obstructions to the public way, and should put up a stile and long planks across a certain brook, for the better accommodation of the public in their use of that way. This was to be done on the soil of another person. On motion to set aside the award—

*Per Cur.*—The direction is not conditional, provided the consent of the owner and occupier of the land are obtained. This is the exercise of an additional power by the arbitrator, assumed by him beyond the submission. The arbitrator had no power to order something to be done on another person's land.

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(*d*) PUBLICATION OF.

MUSSELBROOK *v.* DUNKIN, H. T. 1833. C. P. 1 *D. P. C.* 722; S. C. 9 *Bing.* 605; S. C. 2 *M. & S.* 740—S. P. M'ARTHUR *v.* CAMPBELL, 5 *B. & Ad.* 518—S. P. BROOKE *v.* MITCHELL, E. T. 1840. Ex. 6 *M. & W.* 473; S. C. 8 *D. P. C.* 392.

Publication of

AN award was made in this cause by a barrister, under an order

* Where an award directed a sum of money to be paid by one of the parties to the submission to a stranger, the Court would not grant an attachment for non-payment at the instance of the stranger. *Williams*, J.—(*In Re Skeete*, E. T. 1839, B. C., 7 D. P. C. 618).

an award is established by serving notice that it was ready for delivery on payment of the charges, &c.,

of Nisi Prius. It was ready for delivery on the 19th May, and notice of that fact was given to the parties. His charges being objectionable, they were taxed by the prothonotory in the month of July. The award, however, was not taken up until the 24th November, when the defendant obtained it on paying the taxed charges. Motion to set aside the award—

*Per Cur.*—The application is too late. It is true, it is said, that an award could not be said to be published to a party before he knew what were its contents. But we think it was published when it was made and notice of the fact given to the parties, and that they might obtain it on paying just and reasonable charges. We think it cannot be said to be ready when it can only be obtained by submitting to a wrongful demand. Here, however, all objection to the arbitrator's demand was removed by the taxation of the prothonotary in July.

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TREW *v.* BURTON, E. T. 1833. Ex. 1 *C. & M.* 533.

which ought to be before the time expires for making the award.

THE affidavit for an attachment for not performing an award was objected to, in not shewing that the award was published before the authority of the umpire expired.

The Court held, that it was sufficient if it appeared from the jurat that the affidavit of execution by the umpire was sworn before that time expired.

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DOE *d.* CLARKE *v.* STILLWELL, T. T. 1838. K. B. 3 *N. & P.* 701; S. C. 8 *A. & E.* 645.

Where an award purports to have been published on a certain day, an affidavit, by an attesting witness, of the publication need not state the day it was published.

THIS award purported, and was attested by a subscribing witness, to have been published on a certain day, who also made an affidavit that he saw it published, but did not say when it was published. It was contended that the affidavit was insufficient.

*Sed per Cur.*—It is objected that the award is not shewn to have been made in due time, but it purports and is attested to be so made, and we must presume it was made according to the date on the face of it.

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### (*e*) EFFECT OF MISNOMER OF ARBITRATOR.

TREW *v.* BURTON, E. T. 1833. Ex. 1 *C. & M.* 533; S. C. 3 *Tyrw.* 559.

An umpire, in the recital of his umpirage, by misnaming an arbitrator does not vitiate the award.

ON a reference of this cause to A. & B., with a power to appoint an umpire; an umpire, duly appointed, made his award, in which, by mistake, he recited that he had been appointed umpire by C. & B. The umpire, when the mistake was discovered, offered to republish the award, and afterwards, but it did not appear by whom, the name was altered to the right name.

*Per Cur.*—The question is, whether the award is vitiated by this mistake in the recital? Now, it was unnecessary to make any recital; and if, instead of drawing up the award in a formal manner, he had merely said, "I do make my award, and direct, &c.," without any recital, there is no doubt that the award would have been perfectly valid. We do not think, therefore, that for this mistake the Court would be justified in setting the award aside.

### (*f*) Void as to part, not void as to the whole.

**Wharton *v.* King, T. T. 1831. K. B. 2 *B. & Ald.* 528.**

An award may be good as to part, and void as to the residue*.

In an action on an award, reciting that differences had arisen respecting liabilities of the plaintiff on the defendant's account for bills, to which the plaintiff had lent his name, and which had been negotiated by the defendant; and the arbitrator, after directing certain things to be done, had awarded general releases. The defendant, in his three first pleas, stated certain bills, &c., which were in difference, and alleged that no award had been made respecting them. It also appeared that the arbitrator had awarded satisfaction to be entered of a judgment obtained by a third party against the defendant (by a clerical mistake) for the plaintiff, or that the defendant shall pay a certain sum.

The Court held, first, That the award of releases amounted to a determination, and was a discharge thereof; and, second, That the award directing an impossibility, was not bad, as the alternative was possible and certain, and the plea also, as to that, no answer.

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**Manser *v.* Heaver, H. T. 1832. K. B. 3 *B. & Ald.* 295.**

Hence, it is bad as to a part where the arbitrator makes a portion of the award subject to a contingency, which is to be brought before him again if dispute arise.

An action for penning back a watercourse was referred, and the arbitrator directed that the verdict should stand for £——; and that the defendant should forthwith cleanse and scour the channel; after which, premising that disputes might arise whether it had been properly performed, he reserved liberty for the plaintiff to bring evidence before him as to that matter, and directed that, if brought before him within two months, the award should not be final, and he enlarged the time for making his further and final award for that period.

The Court held, that the latter part of the award was bad, but might be rejected, and the award stand, as to the former part, which was final. Held, also, that it was competent to the defendant to move to set aside the judgment entered up on an insufficient award, although after the proper time for moving to set it aside, where the objection was on the face of the award, and that the objection need not be stated in the rule nisi.

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### (*g*) Effect of†.

**Allen *v.* Milner, M. T. 1831. Ex. 2 *C. & J.* 47.**

An award without performance does not merge the original cause of action.

In assumpsit for tolls. Plea—a submission and award that the defendant should pay the plaintiff £——. Demurrer—that the defendant has not, in his plea, shewn performance of the said award by the payment by him, the defendant, to the plaintiff of the said sum of £——, in that plea mentioned; and that the defendant hath not shewn satisfaction for the non-performance of the said promise

* So, by the law of Scotland an award is good as to the part decided, although the arbitrator shall not decide as to the whole matter. (*M'Clellan* v. *M'Leod*, 1 Dow. P. C. 121).

† Notwithstanding a reference, the defendant may move for costs under 43 Geo. 3. (*Coleridge, J.—Jones* v. *Jehu*, T. T. 1836, 5 D. P. C. 130).

and undertaking; and that the plea amounts to accord only, without satisfaction.

The Court held the plea bad, and that the award was no bar; the award, only ascertaining the amount and ordering payment, did not alter the character of the original debt:—aliter, if the award had directed the delivery of goods, &c., substituting a different right of satisfaction.

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SPENCER *v.* SPENCER, H. T. 1828. Ex. 2 *Y. & J.* 249.

Upon a general reference between partners, debts not fraudulently omitted follow the award, though not brought before the arbitrator.

ON a general reference of all matters in dispute between A., B., and C., co-partners, the arbitrators ascertained the capital, and including a debt from A. and some dubious debts, and, finding the partnership debts and gross value of the stock, awarded the same in specific shares, and directed B. to receive and pay all debts and keep accounts; and on a balance of receipts, credit was to be given for A.'s share against his debt. After the award had been long acted on, it turned out that B. received some debts which had been omitted in the account laid before the arbitrators, and on which the award had proceeded, and also good debts to a larger amount than stated.

The Court held, in the absence of all fraud, that A. was entitled to an account of such, and also of the dubious debts, notwithstanding the general reference; but that any over receipt in respect of the good debts ought to follow the directions of the award, with respect to the dubious debts.

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JOHNSON *v.* DURANT, M. T. 1831. K. B. 2 *B. & Ad.* 925.

And where a question is submitted to arbitrators, and decided on, the award is conclusive;

BY order at Nisi Prius, by consent of parties, it was referred to arbitrators whether the plaintiff was entitled to recover from the defendant the sum of 246*l.* 3*s.*, and whether against such sum the defendant was entitled to set off the sum of 246*l.* 3*s.* for a bale of silk; and the arbitrators found the affirmative of the first and the negative of the second proposition, following the words of the submission. In an action upon the award, the defendant was not allowed to set off a smaller sum as the price due to him for the bale of silk, and the plaintiff obtained a verdict for the whole sum awarded. On an application to set aside that verdict, on the ground that the arbitrators felt themselves bound by the terms of the submission to confine their attention to the particular sum mentioned in it, without taking into their consideration whether the smaller sum was due; it appearing, also, upon the affidavits to have been possible that the arbitrators might have decided the matter upon a question of credit, in which case the question, as regarded both the larger and the smaller sum, would be the same—

*Per Cur.*—We cannot interfere: it would be raising the question whether a party is to be allowed to impeach the decision of arbitrators where, upon a point submitted to them, they have come to a determination. No cases have been cited, and we think that this cannot be done.

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DOE *d.* OXENDEN *v.* CROPPER, H. T. 1839. Q. B. 10 *Ad. & E.* 197; S. C. 2 *P. & D.* 490.

as, where an arbitrator di-

TO an action of trespass for breaking and entering certain closes, there were several pleas of justification, on the ground that the title

to one close (B.) was in the defendant. The plaintiff had also brought an ejectment for closes A. and B. Both actions were referred, at Nisi Prius, to arbitration. The arbitrator awarded, on the ejectment, a general verdict for the plaintiff in ejectment; and, on the action of trespass, awarded a verdict for the defendant on the justifications, and for the plaintiff on the plea of not guilty. The arbitrator, with his award, delivered a piece of paper stating the grounds of his award, and that he considered close B. belonged to the defendant, and not the plaintiff. On motion to amend the postea in the action of ejectment—

*Per Cur.*—The award directs a general verdict; and the plaintiff is entitled to keep it. There is an inconsistency, taking the award and memorandum together; but we cannot interfere.

rects a general verdict in ejectment for closes A. and B., accompanied by a piece of paper, that the lessor of the plaintiff had no title to close B.—the Court refused to amend the postea by confining it to close A.

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WHITEHEAD *v.* TATTERSALL, T. T. 1834. K. B. 1 *Ad. & E.* 491.

IN an action of covenant, to prove the amount of damages, a mutual submission to arbitration was shewn; and an award—"I have surveyed and estimated the several works necessary to be done, in repairing the dilapidations to a house, &c., and find the same amount to the sum of 55*l.* 5*s.*" The Lord Chief Justice was of opinion, that, in default of evidence to impeach this award, the jury must take the damages as found by the umpire. The jury found their verdict accordingly. On motion to set it aside—

The Court refused the rule.

So, where a question as to damages for a breach of covenant was referred, in an action on the covenant:—Held, that the award was conclusive evidence of the amount.

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HARRIES *v.* THOMAS, M. T. 1836. Ex. 2 *M. & W.* 32.

AN action against an attorney for negligence and money had and received, to which defendant pleaded a set-off of bills of costs, on coming on for trial was referred. A juror was withdrawn. By the order of reference, the arbitrator was to settle all matters in difference between the parties touching the defendant's bills of costs, and all the plaintiff's demand on the defendant, with power to have the defendant's bills taxed, and to ascertain the balance between the parties, and direct by and to whom, and when, the same should be paid; but no question of liability was to be raised. The arbitrator directed the defendant's bills to be sent for taxation, and, in the mean time, the plaintiff discovered that the defendant was not admitted in the Courts at Westminster, (but only in the Court of Great Session in Wales), where a considerable part of the business was done; and he raised that objection before the arbitrator. The arbitrator, by his award, after stating that he had heard, examined, and considered the proofs, &c. of the parties, and had admitted and considered the evidence tendered to shew the several times when the defendant was admitted in the superior courts, awarded that the balance due from the defendant to the plaintiff was 170*l.* and a fraction, and directed the defendant to pay the sum to the plaintiff. On motion to set aside the award, on the ground that the arbitrator had exceeded his authority in making any deductions in respect of the defendant's non-admission in the superior Courts, there were conflicting affidavits as to whether the liability in this respect was in the contemplation of the parties at the time of the submission.

The Court, however, set aside the award, and, on a subsequent mo-

At the trial a juror was withdrawn, and the cause referred; the award was afterwards set aside:—Held, the action was finally determined.

tion, stayed the proceedings in the cause, on the ground that the withdrawal of a juror, under the circumstances, finally determined the action.

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STEEPLE *v.* BONSALL, E. T. 1836. K. B. 4 *Ad. & E.* 950.

Judgment non obstante veredicto cannot be obtained where the arbitrator has put an end to all proceedings.

IN an action of trespass in which issues were joined on three pleas: first, a right of way in respect of the occupation of certain premises; second, a public highway over the close; third, a footway. By consent and agreement, the cause was referred to arbitration.

The arbitrator awarded a verdict for the defendant on the last issue, and for the plaintiff on the others; adding, if there had not been the third plea, he should have awarded 1*s.* damages to the plaintiff upon the other issues. On motion to enter judgment non obstante veredicto—

*Per Cur.*—The arbitrator, by his award, has found a verdict for the plaintiff on the two first issues, and a verdict for the defendant upon the issue relative to a consent to use a right of way; and he goes on to say—"If there had been no issue relative to the consent and agreement I should have awarded 1*s.* damages to the plaintiff on the other issues." The arbitrator, therefore, seems to have considered the third plea as not a good plea; but he has not, on the face of his award, reserved any point; and the application is now made to the Court for judgment on the third issue, non obstante veredicto; but it appears to us that it is not open to the plaintiff to come and make this application. The award of the arbitrators is final, and is an end of the proceedings.

*See Ashton* v. *Poynter*, 2 *D. P. C.* 651; *Symes* v. *Goodfellow*, 2 *N. R.* 532; 2 *B. & B.* 297; *and* 11 *Price*, 162.

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DUNN *v.* MURRAY, T. T. 1829. K. B. 9 *B. & C.* 780; S. C. 4 *M. & R.* 571.

An award upon a submission of all matters in difference in a cause, includes a demand not before the arbitrator, but within his authority*.

AN action for the breach of hiring for a year by wrongful dismissal was brought before the end of the year, and the declaration was for wages generally, and also specially for damages in respect of such dismissal; and all matters in difference were referred; and an award was made in a general action brought for wages accruing subsequently to the commencement of the first action, on the ground that no claim was made upon the first reference in respect thereof, except so far as the declaration, and the evidence of the employment and dismissal, might amount to a claim.

*Per Cur.*—It is clear that the present claim might have been brought before the arbitrator on that occasion; and in the case of *Smith* v. *Johnson*, (15 East, 213), Lord *Ellenborough* lays it down, that, where all matters in difference are referred, the party as to every matter included within the scope of such reference ought to come forward with the whole of his case. So, here the present claim was within the scope of the former reference, for it arose out of the dismissal; it was the duty of the plaintiff to bring it before the arbitrator, if he meant to insist upon it as a matter in difference; and we are

* If, upon an award, a release is executed of such a general nature as to extend to matters not adjudicated on, it shall be confined to the matter referred. (*Taunton*, J.—*Upton* v. *Upton*, E. T. 1832, B. C., 1 D. P. C. 400).

of opinion that he cannot now make it the subject-matter of a fresh action.

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PETITS *v.* FOUNTAIN, E. T. 1839. C. P. 5 *Bing. N. S.* 442; S. C. 7 *Scott*, 441; S. C. 7 *D. P. C.* 426, *by name of* PETITS *v.* CONLAN.

And where a cause is referred, and part of the claim is not due even at the time of the trial, if pleaded, it may be included in the order of reference.

IN assumpsit for use and occupation, the defendant pleaded a set-off, and, in her particular, stated the items on which the claim was founded, and which, by an agreement between the parties, was not to be due or payable before the 1st August, 1838. Upon the trial being called on, the 27th July, three days before the sum claimed to be set-off was due, the case was referred to a barrister, who was directed by the order of reference to take into his consideration and decide upon all matters in difference between the parties, including the claim of the defendant in her set-off:—

Held, that the arbitrator was right in making his award upon the sum due on the 1st August, though it was not due at the time when the plea was pleaded, nor when the order of reference was made on the 27th July, inasmuch as the matter came within the words of the order, and included the claim of the defendant on the set-off.

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EVANS *v.* REES, E. T. 1839. Q. B. 10 *Ad. & E.* 151; S. C. 2 *P. & D.* 626.

But an award is not evidence of boundaries between third parties and parties in no way privy to the reference.

REPLEVIN for taking cattle: avowry, damage feasant on the part of plaintiff. The question was, as to the boundary of the plaintiff's county. An award in a suit, in which the parties were different, and with whom the present suitors had no privity, and in which the arbitrator set out the boundary as proved before him, and a verdict was entered according to his directions, was offered in evidence, but rejected by the Judge. On a motion for a new trial—

The Court said, the rejection was quite right: the award is but the opinion of the arbitrator, founded, not upon his own knowledge as declarations used by way of reputation commonly are, but upon the result of evidence laid before him, most probably, in private, and found also post litem, having none of the qualities upon which evidence of reputation rests.

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### (*h*) CONSEQUENCES OF NO AWARD BEING MADE.

HALL *v.* PHILLIPS, T. T. 1832. C. P. 9 *Bing.* 89; S. C. 2 *M. & Scott*, 167.

Where a cause is referred and the arbitration not proceeded in, the Court will allow the cause to be resumed,

A VERDICT was taken for the plaintiff with damages, subject to the award of an arbitrator within a specified time; the arbitrator allowed the time to elapse without enlarging it, and the defendant refusing to proceed with the arbitration. On motion for judgment for plaintiff—

*Per Cur.*—Our opinion is, that, under the circumstances of this case, the time for the award having expired without any default on the plaintiff's part, the question must still be considered as open, and the cause go down again to trial.

TAYLOR *v.* GREGORY, T. T. 1831. K. B. 2 *B. & Ad.* 774.

unless terms be consented to.

A VERDICT was taken for 3000*l.*, subject to an award to be made by a certain day as to the amount of damages. The arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged.

The Court granted liberty to the plaintiff to enter up judgment and issue execution forthwith for the whole amount of the verdict, unless the enlargement was consented to.

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GREEN *v.* POLE, H. T. 1830. C. P. 6 *Bing.* 443; S. C. 4 *M. & P.* 198.

And the same rule holds after revocation by deed.

THE plaintiff, after a reference under an order of Nisi Prius, (not being a rule of Court), revoked, by deed, the authority of the arbitrator before the award was made, and gave the defendant notice of trial. On a rule nisi to stay the proceedings, on the ground of mala fides on the part of the plaintiff—

*Per Cur.*—We cannot interfere. The law gives a party the right of revoking his authority at any time before the order of reference is made a rule of Court. If this be done, the dread of an attachment may prevent him from withdrawing from the reference. The plaintiff might fairly have seen difficulties in the way of his proceeding before the arbitrator.

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EVANS *v.* DAVIES, E. T. 1835. Ex. 3 *D. P. C.* 786.

But where a verdict is taken, subject to a reference, and no award made, the plaintiff cannot proceed to trial without getting rid of the verdict.

ON motion to set aside a verdict, it appeared that the cause was referred at the assizes, and, by consent, a verdict was entered for the plaintiff—damages 50*l.*, costs 40*s.*, subject to the award of an arbitrator. The time for making the award expired without an award being made; the time was further enlarged, by consent, and the enlarged time having also expired without an award being made, the plaintiff gave notice of trial, and proceeded to the trial of the cause and obtained a verdict. A Judge's order having been previously obtained for altering the return in the distringas, the clerk of assize, at the trial, erased the indorsement of the previous verdict and entered the new verdict in the usual way.

*Per Cur.*—The first verdict should have been set aside before the plaintiff proceeded to trial a second time, being binding as long as it remains on the record.—*Rule absolute.*

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LAWRENCE *v.* HODGSON, E. T. 1827. Ex. 1 *Y. & J.* 368.

Nor can judgment, where proceedings have been stayed subject to a reference, be entered up if one of the parties die.*

A VERDICT was taken, at the Spring Assizes, in an action of trespass, subject to a reference as to the damages. The award, published in Michaelmas Term, was afterwards set aside, and a motion in the subsequent Hilary Term, to enter up judgment and issue execution for the damages, unless the defendant would consent to the appointment of another arbitrator.

The Court refused it, the plaintiff having died in September previously. Upon a subsequent application to be permitted to enter up judgment as of the Michaelmas Term, nunc pro tunc, the Court,

* Nor after several terms, without leave of the Court. (*Patteson*, J.—*Brooke* v. *Fearns*, E. T. 1833, K. B., 2 D. P. C. 144).

considering that the delay was attributable to the party's laches and not to the act of the Court, refused to interfere.

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(*i*) Of judgment*, and verdict in pursuance of the award.

Platt *v.* Hall, E. T. 1837. Ex. 2 *M. & W.* 391; S. C. 5 *D. P. C.* 583.

An affidavit to enter a verdict on an award is sufficient, if it state "a paper writing annexed" to be a copy of the award.

A rule for entering a verdict for plaintiff, pursuant to an award, was drawn up on reading the affidavit of J. C. (arbitrator's clerk), "and the paper writing annexed;" and the affidavit further verified "the paper writing" as a copy of the award. It was objected that the rule was not in the proper form. It was drawn up on reading the affidavit of J. C., and the paper writing annexed, which was insufficient as the document itself must be specified. (*Sherry* v. *Oke*, 3 D. P. C. 349).

*Sed per Cur.*—The paper writing is verified as a copy, which clearly distinguishes the cases.

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(*k*) Remedies on.

1st. Election of a Remedy.

Lonsdale *v.* Whinnay, M. T. 1833. Ex. 1 *C., M. & R.*, 591; S. C. 5 *Tyrw.* 203; S. C. 3 *D. P. C.* 263.

An award cannot be enforced by attachment, and an action sustained upon it at the same time.

On motion to discharge the defendant out of custody on an attachment, it appeared that certain matters in difference between the parties had been referred to arbitration, and the arbitrator made his award in favour of the plaintiff. The defendant, however, not obeying the award, had been taken into custody on an attachment. The plaintiff served him with a writ of summons in an action upon the award while he was in prison.

The Court discharged the defendant out of custody on the terms of his entering into a recognizance to the satisfaction of the Master, conditioned as a recognizance of bail.

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Paull *v.* Paull, M. T. 1833. Ex. 2 *D. P. C.* 340; S. C. 2 *C. & M.* 235.

Where an action has been commenced on an award, an attachment will not be granted, except on the terms of discontinuing the action and paying the costs incurred.

On motion for an attachment for non-performance of an award, it appeared from the affidavits, that an action of debt had been commenced upon the award, and that an appearance had been entered to it. It was objected that the plaintiff, by commencing an action, had elected to adopt that remedy, and that the Court would not interfere now by summary process and expose the defendant to the vexation of two separate proceedings.

And of that opinion were the Court, and said it could not be done; had the plaintiff discontinued his action and paid the costs before applying for this attachment, the application would have been perfectly regular.

* Under a submission that the successful party may sign judgment for the amount of the claim and costs, the defendant may sign judgment for his costs only, if the award authorizes it. (*Williams*, J.—*Maggs* v. *Yorston*, E. T. 1838, K. B., 6 D. P. C. 481).

2nd. By Action.

1. *When Sustainable.*

Thornton *v.* Hornby, M. T. 1831. C. P. 8 *Bing.* 13; S. C. 1 *M. & Scott*, 48; 1 *D. P. C.* 237.

An award, "that the defendant has overpaid the plaintiff," cannot it seems be enforced except by action*;

The defendant had paid 600*l.* into Court, and the cause and all matters in difference were referred; the arbitrator awarded that the defendant had overpaid the plaintiff 34*l.*

The Court thought there was sufficient doubt on the face of the award to justify the refusal of an attachment, and to leave the plaintiff to his remedy by action.

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Church *v.* Stringer, T. T. 1831. K. B. 2 *B. & Ad.* 777; S. C. 1 *D. P. C.* 332.

nor interest payable under an award, after payment of the principal.

Motion for an attachment for non-payment of interest. The principal sum awarded had been paid, and had been received by the plaintiff without prejudice to his claim for interest between the time when it ought to have been and the time when it was actually paid.

*Per Cur.*—No doubt interest may be recovered, but we never heard it could be proceeded for by attachment.

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Maffey *v.* Goodwin, H. T. 1833. K. B. 1 *D. P. C.* 538; S. C. 1 *M. & N.* 101.

And, after the death of the defendant, the award can only be enforced by action;

After a reference, under a Judge's order, made a rule of Court, and award made in favour of the defendant, he died.

The Court refused an attachment against the plaintiff for the costs taxed at the instance of the defendant's personal representative—the only remedy being by action.

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Dowse *v.* Coxe, E. T, 1825. C. P. 3 *Bing.* 20; S. C. 10 *Moore*, 272.

as, where a submission contained a power that death should not revoke the submission, an award, after the death of one, against the executors, that they, as executors, should pay.

The plaintiff declared, in assumpsit, that certain differences had arisen, and a certain suit was then depending in Chancery, in which the plaintiff and divers other persons, including infants, were plaintiffs, and P. K., T. B., (since deceased), and J. R., defendants; and that, by an order of the Vice-Chancellor, it was ordered, with the consent of the attornies of the parties in the suit, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs and P. K. and T. B., (since deceased), should be referred to the arbitrament of an arbitrator, who was to be at liberty to make one or more award or awards, as he should think fit; and that, in case either of the parties should happen to die before the making of the award, the reference was not to abate, but that the executors and administrators of the parties so dying were to be taken as parties to the order, in like manner as their testator or intestate; that, before the making of the award, J. B. died, and that the arbitrator afterwards awarded that the defendants, executors of T. B., should pay the plaintiff a

* Assumpsit for not "standing and abiding by the award," is maintainable. (*Brown* v. *Tanner*, 1825, N. P., 1 C. & P. 651). So, an action lies on an award made under a submission by a Judge's order. (*Wharton* v. *King*, 1 M. & Rob. 96).

certain sum of money, out of the assets of the said T. B., on a particular day mentioned in the award; by reason of which the defendants, as executors, became liable to pay; and, being so liable, they, the executor and executrix as aforesaid, promised to pay.

The Court held, on a special demurrer, that the action was well brought against the executors, although it was objected, first, that the promise alleged to have been made by the defendants was a personal promise, for which there was no consideration; secondly, that the arbitrator was not properly constituted as to some of the parties, and that a sufficient authority to refer was not shewn; and, lastly, that the authority to refer was not revoked by the death of T. B.

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2. *Affidavit to hold to bail.* See ante, tit. *Affidavit to hold to Bail.* and post, tit. *Arrest.*

DRIVER *v.* HOOD, M. T. 1827. K. B. 7 *B. & C.* 494; S. C. 1 *M. & R.* 324.

Where money under an award is to be paid on demand, an affidavit to hold to bail must state a demand.

UPON an affidavit of debt made by the plaintiff, stating, that in a certain action, in which H. was the plaintiff, and D. the defendant, referred to arbitration under an order of Nisi Prius, afterwards made a rule of Court, the costs of the action to abide the event of the award, the arbitrators had directed that D. should, upon the receipt of the award, pay the sum of 17*l.* 17*s.*, the costs of the reference, to the attornies of the arbitrator; and that H. should, upon demand, repay, or cause to be repaid, the said sum, and that D. did accordingly pay the said sum. And, further, that the costs in the said action, after being duly taxed, amounted to the sum of 7*l.* 7*s.*, which, together with the 17*l.* 17*s.*, amounted to 25*l.* 4*s.*, &c.

*Per Cur.*—The affidavit is unquestionably defective in not stating a demand.

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3. *Pleadings.*

RIDDELL *v.* SUTTON, M. T. 1828. C. P. 2 *M. & P.* 345.

Debt lies on an award against an executor under a submission, entered into by him*.

BY an agreement, after reciting that disputes and differences had arisen, and were depending, between the plaintiff and defendant, as executrix, respecting certain unsettled accounts between them; and that, for finally settling such differences, it was referred to arbitrators. In an action of debt on the award, it was contended it did not lie. Mr. Serjeant *Williams*, in a note to *Turtill's case*, (2 Saunders Rep. 74), says, an action of debt upon simple contract does not lie against executors or administrators, because they are presumed to be ignorant of the contract made by their testator or intestate.

*Sed per Cur.*—It has been objected, that the declaration is bad in form and in substance, as an action of debt upon simple contract does not lie against an executor, upon the principle that an executor cannot wage his law of a debt contracted by his testator, as the former must be presumed to be ignorant of the nature of the contract made by the latter. However, that doctrine cannot be extended to a case like the present, where the contract or undertaking to abide by the terms of the award originated with the executrix herself, and therefore the action may be maintained.

* And see 3 & 4 Will. 4, c. 42, post, tit. *Executor and Administrator.*

GASCOYNE *v.* EDWARDS, M. T. 1826. Ex. 1 *Y. & J.* 19.

A plea of an award, without averring performance, is a good plea if there be mutual remedies.

To an action of covenant upon a submission to arbitration by deed, with mutual covenants to stand to and perform the award. Plea—an award, by which it was awarded that the defendant should pay the plaintiff 5*l.*, should put the premises in question in repair, and leave the same at Lady-day, without averring performance. On demurrer—

*Per Cur.*—The case of *Crofts* v. *Harris*, which is reported in Carthew's Reports, 187, is decisive of the present question. The case was argued on demurrer; and it was adjudged by the Court, that an award without performance is a good bar to an action on the case, if the parties have mutual remedies against each other, to compel the execution of the matters awarded, but it is otherwise if there be no mutual remedies to enforce the performance.

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THORP *v.* COLE, T. T. 1835. Ex. 2 *C. M. & R.* 367; S. C. 4 *D. P. C.* 457.

So, a plea setting out an award, and averring that it was bad in law, held, on demurrer, to be a good plea.

IN assumpsit upon an award, the plea set out the award, and concluded, "the defendants, in fact, say that the award is bad, and void in law; and this they are ready to verify." On demurrer—

*Per Cur.*—The plea is good in point of form; it admits the submission and award, so far as stated in the declaration, but sets out both at full length, and thereby raises a question whether the award be valid in law. The conclusion, which is objected to as referring matters of law to the jury, is either the statement of an inference of law from the premises, as if it had said, and so the defendants say, that the said award is bad and void in law, or it may be rejected as surplusage.

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GRAZEBROOK *v.* DAVIS, E. T. 1826. K. B. 5 *B. & C.* 534; S. C. 8 *D. & R.* 295.

But a plea that the defendant revoked the submission is not sustainable.*

To an action of debt, on bond conditioned for the performance of an award, the defendant pleaded that the arbitrator refused the defendant's request to allow further time to defendant to bring forward his witnesses, without the plaintiff's consent, and that defendant therefore revoked the submission. On demurrer—

* In *Aitchison* v. *Cargey*, in error, (T. T. 1824, Ex., M'Clel. 367; S. C. 3 D. & R. 433; S. C. 2 B. & C. 170), the declaration stated that the plaintiff and defendant below, by articles of agreement, reciting that several actions, arising out of the same transaction, had been brought and defended by the plaintiff and defendant below, G. A. & D. A.; and that, in one of them, the assignees of one J. T., a bankrupt, recovered against the plaintiff 2500*l.*, and that disputes existed between the plaintiff and defendant below respecting the value of the stock and goods which each had received into his custody from a certain farm, and their keep and feeding by the plaintiff, and also concerning the proportion which each was to pay of the said sum of 2500*l.*, according to an agreement entered into between them before the assizes, and also concerning the costs of bringing and defending the actions above-mentioned, submitted themselves to the award of J. T., J. R. & T. C. respecting the said matters. That the arbitrators, having heard and duly weighed the allegations, &c., and examined vouchers, &c., awarded that the defendant below should pay the plaintiff below 444*l.*; that five-eighths of the costs of the several actions should be paid by the plaintiff below, and three-eighths by the defendant below; that all sums already expended by either of them, on account of the suits, or in any way connected therewith, should be considered as part payment of his share; and that upon payment of the 444*l.*, and the costs and expenses of the suits, mutual and general releases should be given. On writ of

The Court were of opinion that the plea could not be sustained; first, because, in point of form, it did not allege that proof was given of the necessity for more time; and also, in substance, the improper conduct of the arbitrator not being pleadable in bar, but only affording a ground of application to the Court to set aside the award.

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RIDDELL *v.* SUTTON, M. T. 1828. C. P. 2 *M. & P.* 345.

And in an action on an award against an executor, he cannot plead there was no evidence of assets before the arbitrator.

BY an agreement, after reciting that divers disputes and differences had arisen, and were depending, between the plaintiff and defendant, as executrix, respecting certain unsettled accounts between them; and that, for finally settling such differences, it was agreed that the matters in dispute should be referred to the final award of two arbitrators. To an action of debt on the award, the defendant pleaded that there was no evidence of assets produced before the arbitrator. On demurrer—

The Court held the plea bad, as it imputed misconduct to the arbitrators, which is not the subject of a plea, but only a ground to apply to the Court to set aside the award.

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4. *Evidence.*

FERRER *v.* OVEN, M. T. 1827. K. B. 7 *B. & C.* 427; S. C. 1 *M. & R.* 222.

In an action on a submission bond against one, an averment of mutual submission renders it essential to prove the execution by all parties.

DEBT on an award. The declaration averred a mutual submission of several plaintiffs, and the defendant, and one L. At the trial the plaintiffs proved the execution of the bond of arbitration by the defendant, but did not give sufficient evidence of the execution of the counter bond to the defendant by the plaintiffs, and none at all of the execution by L. of the bond of the plaintiffs. It was objected by the defendant that L. was a party to the submission, and that the execution by him ought also to be proved, although the bond was joint and several.

*Per Cur.*—The action is brought, not upon the bond, but upon the submission and umpirage. The declaration avers submission by all the parties, by the plaintiffs as well as the defendants, and by L. as well as the rest. The proof should have been co-extensive with the averment. The execution by the plaintiffs, and the execution by L., ought to have been proved, as averred; and there was no evidence of either.

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STUART *v.* NICHOLSON, M. T. 1836. C. P. 3 *Bing. N. S.* 113; S. C. 3 *Scott*, 536.

But an undertaking, ordered by the arbitra-

IN an action upon an award, it appeared that the arbitrators directed an undertaking to be given by the defendant not to pirate certain inventions of the plaintiff, the subject of the reference, and

error brought after demurrer to the declaration, overruled in the Court below, judgment affirmed; it not appearing on the record that the arbitrators had not taken all the matters referred into consideration, and plaintiff below having been originally liable for the whole 2500*l.*, and therefore continuing liable for it all except the 444*l.* awarded to him. The first part of the award was sufficiently certain; and though the arbitrator's allowance of the sums expended on account of or connected with the suits exceeded their authority, and was a nullity, yet that did not vitiate the former parts of the award.

tor, when signed, is binding, at all events, as evidence of the submission.

which was accordingly signed by him. At the trial there was no evidence of a submission to arbitration, except that the defendant had signed the memorandum directed by the arbitrators.

*Per Cur.*—We think the signature of the memorandum of agreement by both the defendants, which agreement was directed by the arbitrators after the investigation of the case, to be given by the defendants, was a sufficient recognition of the authority of the arbitrators to supply the place of a more regular and formal submission.

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GISBORNE *v.* HART, E. T. 1839. Ex. 5 *M. & W.* 50.

And an award is primâ facie evidence to support a declaration on it, until impeached by evidence for the defence.

IN an action upon the award, the declaration stated that the former cause was pending, and, by a rule of Court, was referred to the award of A. B., and that he duly made and published his award of and concerning the premises so referred to him, and did thereby find, &c. To this the defendant pleaded, that A. B. did not duly make and publish his award, of and concerning the premises referred, in manner and form.

Held, that the production of the award, which was good on the face of it, and of the rule of Court, was primâ facie sufficient to support the issue on the part of the plaintiff, and that the defendant, wishing to impeach the award, must do so by his own evidence.

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5. *Damages.*

JOHNSON *v.* DURANT, M. T. 1830. N. P. 4 *C. & P.* 327.

Interest is recoverable from the time of demanding the sum awarded.

IN an action of debt on an award, the allowance of interest was objected to.

Lord *Tenterden*, C. J.—It is a liquidated sum, and I am of opinion that interest ought to be allowed upon it from the time at which the sum awarded was demanded.

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3rd.—BY ATTACHMENT.

1. *Of the Parties*.*

2. *Of the Demand†.*

SYKES AND ANOTHER *v.* HAIGH, T. T. 1835. C. P. 2 *Scott*, 193; S. C. 4 *D. P. C.* 114.

Where a bond was to be given up to several plaintiffs, there should be a demand by all.

THE arbitrator had directed a bond to be given up to three plaintiffs. On motion for an attachment, it appeared that the demand had, however, been made by only one; but an affidavit was made by the other two plaintiffs, stating that they had concurred in the demand being made by the one plaintiff.

*Sed per Cur.*—The award gives the plaintiffs a joint right to receive the bond. It ought to be shewn, therefore, that the defend-

* If an award directs three parties to pay equal proportions, there must be separate attachments against each. (*Littledale*, J.—*Gulliver* d. *Hodson* v. *Summerfield and Others*, H. T. 1836, B. C., 5 D. P. C. 401).

† To ground an attachment for non-performance of an award, the demand need not be made on the day the sum of money was to be paid. (*Williams*, J.—*Re Craike*, E. T. 1839, B. C., 7 D. P. C. 603).

ant could know that the demand was made by the authority of all the persons to whom, by the terms of the award, he was bound to deliver the document.

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LAUGHER *v.* LAUGHER, E. T. 1831. Ex. 1 *C. & J.* 398; S. C. 1 *Tyrw.* 352; S. C. 1 *D. P. C.* 284.

And where a demand is made by a third party, under a power of attorney, the execution must be proved by affidavit.

To ground an attachment. The demand was sworn to be made under and by virtue of a power of attorney, signed and delivered by the plaintiff to the party by whom the demand was made; but there was no affidavit by the subscribing witness of the execution of the power of attorney; nor was it sworn that a copy of the power of attorney was left with the defendant when the demand was made.

*Per Cur.*—The due execution of such power must be proved by the attesting witness, and a copy of the authority left with the person on whom the demand is made.

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HIGGINS *v.* WILLES, M. T. 1828. K. B. 3 *M. & R.* 382.

To obtain an attachment on the ground of an action commenced and discontinued, the demand must have been made pending the action.

MOTION for an attachment for non-performance of an award. An action had been commenced and discontinued. It was contended, that, in *Badley* v. *Loveday*, (1 B. & P. 87), the Court of Common Pleas refused to grant an attachment pending an action on the award, nor would they allow the plaintiff to waive the action to enable him to apply for an attachment, on the ground, that, by bringing the action, the plaintiff has made his election.

*Per Cur.*—The affidavits do not shew whether the action was pending at the time the demand was made; but, in order to repel the application, it lay upon the party resisting it to shew that the action was pending when the demand was made. It seems to us, therefore, that we are not precluded by the decision in *Badley* v. *Loveday* from granting the attachment.

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### 3. *When granted or refused*.*

MAYOR OF BATH *v.* PINCH, H. T. 1837. C. P. 4 *Scott*, 299.

The order, or submission, must be made a rule of Court to obtain an attachment.

BY an order of Nisi Prius, the cause and all matters in difference between the parties were referred to arbitration. The arbitrator made his award. The order had not been made a rule of Court. On motion for an attachment—

The Court refused it, observing that the ground of the motion for an attachment is not the mere non-performance of the award, but the disobedience of a rule of Court.

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HETHERINGTON *v.* ROBINSON, H. T. 1839. Ex. 4 *M. & W.* 608.

And where the validity of the award is doubt-

A CAUSE was referred to two arbitrators, who had power to appoint an umpire, the costs of the cause to abide the event; and each of the parties bound himself to stand to, obey, and keep the award of

* Where a length of time, so great as four years, has elapsed since the making of an award, the Courts will not grant an attachment without an affidavit explanatory of the cause of delay. (*Patteson*, J.—*Storey* v. *Garry*, H. T. 1840, B. C., 8 D. P. C. 299).

ful an attachment will not be granted;

the said two arbitrators and their umpire, so as the award of the arbitrators and their umpire be made before a certain day. An award was made by the two arbitrators only, and they found two issues for the plaintiff, and one for the defendant, and directed "that the costs of the said cause, and the several issues found therein, shall be paid to the plaintiff or to the party entitled thereto." Upon motion for an attachment—

*Per Cur.*—That the validity of the award being made by the two arbitrators only, was too doubtful to grant an attachment upon it.

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LEES *v.* HARTLEY, M. T. 1840. Ex. 8 *D. P. C.* 883.

or where there is a misnomer of the defendant.

THE arbitrator, in his award, ordered a sum of money to be paid, and costs, on a certain day, by the defendant, calling him "Edmond" instead of "William," his real name.

On motion for an attachment, the Court refused it.

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RUSSELL *v.* YORKE, E. T. 1837. C. P. 4 *Scott*, 422.

And it cannot be obtained for an act done contrary to the award by the defendant's servant without his consent.

ACTIONS of trespass, involving a right of way, were referred. The arbitrator by his award directed, that the defendant should give an undertaking to discontinue the user of the way in question. On a motion for an attachment for the non-performance of the award, the order of Nisi Prius having been made a rule of Court, the defendant swore that he had not himself used the way, nor had it been used by any of his servants, with his consent or knowledge.

*Per Cur.*—It is sworn that the trespasses complained of were not committed by the defendant or his servants with his consent or knowledge; that he has never, since the date of the undertaking, used the way himself, nor did he ever order or authorize any of his servants or labourers to use it. We cannot interfere.

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HOPKINS *v.* DAVIES, H. T. 1835. Ex. 1 *C., M., & R.* 846; S. C. *by name of* SCOTT *v.* WILLIAMS, 5 *Tyrw.* 506; S. C. 3 *D. P. C.* 508—S. P. EDGELL *v.* DALLIMORE, T. T. 1826. C. P. 3 *Bing.* 634; S. C. 10 *Moore*, 541—S. P. *In re* SEAWARD, M. T. 1838. B. C. 7 *D. P. C.* 318.

Nor can an award be enforced by attachment, unless the award orders "payment."

THERE was a reference of the cause and all matters in difference between the parties, and the arbitrators awarded that there is no balance due from the defendant to the plaintiff, but that a balance of 26*l.* is due from the plaintiff to the defendant, but they did not order that sum to be paid. On motion for an attachment, the case of *Edgell* v. *Dallimore*, 3 Bing. 634, was used as an answer to the application. In that case there was an award that a debt was due; but it contained no order to pay, and the Court of Common Pleas refused to grant an attachment, because it was not shewn that the party had disobeyed any order in the award.

*Per Cur.*—We agree with that decision, and think that what is there stated by the Court is correct. Though an action may be maintainable on the award; yet, if no order to pay the money be expressed in it, how can we say that the party is in contempt?

DONLAN *v.* BRETT, M. T. 1834. K. B. 2 *A. & E.* 344; S. C. 4 *N. & M.* 854, *overruling* CARTWRIGHT *v.* BLACKWORTH, 1 *D. P. C.* 489.

Merely directing "a verdict to be entered for plaintiff, with £—— damages," is not an order to "pay."

BEFORE plea, the cause and all matters were referred. The costs were to abide the event of the suit. The arbitrator awarded a verdict to be entered for the plaintiff, with 55*l.* damages. The order of reference having been made a rule of Court, a rule had been obtained calling on the defendant to shew cause why an attachment should not issue for the non-payment of the sum of 55*l.*

*Per Cur.*—It has been contended that the arbitrators awarding a verdict to be entered for the plaintiff, damages 55*l.*, was equivalent to awarding that that sum of money should be paid by the defendant; but there is a case in the Exchequer, of *Jackson and Others* v. *Clarke*, (M'Clel. & Y. 200), in which it was held not to be so. Mr. Justice *Littledale* agrees with the rest of the Court, in thinking that this rule ought to be discharged; and he says, that he should not have decided the case of *Cartwright* v. *Blackworth*, cited supra, in the way in which he did, had the case which had been determined in the Exchequer been brought to his notice.

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LEE and HEMINGWAY, *In re*, E. T. 1834. K. B. 3 *N. & M.* 860.

So, a mere valuation on a purchase, cannot be enforced by attachment, though a rule of Court.

UPON an agreement, under seal, for the settlement of differences, it was agreed that H. should purchase lands, &c. belonging to L., at a price to be determined by two arbitrators; and L. covenanted to make a perfect title, and to execute the conveyance, upon payment of the price so fixed. The agreement was made a rule of Court, H. refusing to pay the price assessed by the arbitrators. On motion for an attachment—

*Per Cur.*—Rule refused. This is not a reference to arbitration in the usual acceptation of the term.

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HALDEN *v.* GLASSCOCK, E. T. 1826. K. B. 5 *B. & C.* 390; S. C. 8 *D. & R.* 151.

And, where time is enlarged, the enlargement must appear by consent, though under a judge' order.

BY consent, a cause was referred. Before the time for making the award expired, *Abbott*, C. J., by several orders enlarged the time. The award was ultimately made. On motion for an attachment, the defendant contended that the orders enlarging the time for making the award were not made by the consent of himself or his attorney.

And by the Court—To bring the party into contempt, at least it must be shewn that the enlargement of the time was by consen

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READE *v.* DUTTON, M. T. 1836. Ex. 2 *M. & W.* 69.

And no attachment lies unless the time be enlarged by all the arbitrators, even when the umpire is afterwards appointed, and no step was to be taken before

A CAUSE, and all matters in difference, had been referred by a Judge's order to the award of two arbitrators, and such third person as they shall appoint by writing under their hands, to be indorsed thereon, before they shall proceed on the matters referred to them, or of any two of them, so that they, or any two of them, shall publish their award on or before the first day of Easter Term, or of such day as they, or any two of them, shall at any time appoint, by writing, under their hands. The two arbitrators made an enlargement of the time before they appointed the umpire.

such appointment.

The Court held, that though both parties subsequently attended the reference, they could not grant an attachment for non-performance of the award, as the enlargement of the time for making the award was invalid.

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THE QUEEN *v.* GORE, M. T. 1839. Q. B. 8 *D. P. C.* 102.

But where an indictment for a misdemeanor after verdict is referred, the prosecutor, on non-performance of the award, may proceed by attachment, but previously copies of the affidavit should be delivered to the defendant.

AN indictment for a nuisance had been, after verdict for the prosecutor, referred. The arbitrators awarded that it should be abated. This not having been done, a motion was made for judgment; but, on its being objected that the application was irregular, the defendant not having been supplied with copies of the affidavit—

The Court directed the matter to stand over, that copies might be delivered, observing, that the prosecutor might either proceed by attachment, or by moving for judgment.

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M'ARTHUR *v.* CAMPBELL, M. T. 1834. K. B. 4 *N. & M.* 208.

And it is no answer to a rule for an attachment that the award is bad by reason of extrinsic matter, when the time for setting aside has expired.

ALL matters in difference between the parties were, by a Judge's order, referred to an arbitrator. The arbitrator made his award on the 12th November, 1832, and the order of reference having been made a rule of Court, the plaintiff, in Easter Term, 1833, obtained a rule for setting aside the award, on the ground that the arbitrator had not awarded with respect to a set-off, which was a matter of dispute between the parties.

*Per Cur.*—The question here is, whether the application, having been made too late for setting aside the award, the plaintiff can be permitted, in shewing cause against a rule for an attachment, to allege defects in the award which do not appear on the face of it. Mr. Tidd, in his Practice, says, "A party cannot, in shewing cause against an attachment, impeach the award for any extrinsic matter;" and we concur in that view.

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BRAZIER *v.* BRYANT, T. T. 1825. C. P. 3 *Bing.* 167; S. C. 10 *Moore*, 587.

Nor is corruption in the arbitrators any answer to a motion for an attachment.

IN answer to a motion for an attachment, an affidavit of corruption in the arbitrator was produced—

But the Court held, although it might have formed the ground of a specific motion for setting aside the award, it was no answer to the attachment.

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RICHMOND *v.* PARKINSON AND LORD, E. T. 1835. Ex. 3 *D. P. C.* 703—S. P. *In re* BARWICK, E. T. 1835. Ex. 3 *D. P. C.* 703.

To ground an attachment there must be personal service, unless an action will not lie*.

ON motion for an attachment for non-payment of money pursuant to an award and the Master's allocatur—one defendant had not been personally served—

*Per Cur.*—You must make out a very strong case before the Court will allow any thing short of a personal service to be sufficient, unless an action will not lie.—*Rule Nisi.*

* And an attachment may issue where defendant refuses to take the copy of the award and rule. (*Littledale*, J.—*Ellis* v. *Giles*, M. T. 1836, B. C., 5 D. P. C. 255).

### 4. *Affidavits connected with.*

TREW *v.* BURTON, E. T. 1833. Ex. 1 *C. & M.* 533; S. C. 3 *Tyrw.* 559.

The day the award is published should be stated in the affidavit*.

ON motion for an attachment, it was objected that the affidavit was defective, as it did not state on what day the award was published.

*Per Cur.*—We should have thought that objection good, and that we could not make the rule for an attachment absolute if there were nothing from which the Court could collect that it was published before the day when the power of the umpire expired. But, on inspecting the jurat of the affidavit of execution, we find that the affidavit was sworn before that day, which is an answer to that objection.

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PAYNER *v.* HATTON, M. T. 1840. Ex. 8 *D. P. C.* 891.

An affidavit in support of an attachment for non-payment of several sums of money, must state he did not pay the sums, "or either of them."

ALL matters in difference were referred to an arbitrator. He awarded that the action should not be continued, and that the plaintiff should pay certain sums to the defendant on a certain day. The sum, awarded, and costs, not being paid, motion was made for an attachment. And the affidavit, in stating the demand, alleged "that the plaintiff did not pay the same sums, or any part thereof."

The Court held the affidavit insufficient, because it did not contain the words "or either of them."

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BARTON *v.* RANSON, H. T. 1838. Ex. 3 *M. & W.* 322; S. C. 6 *D. P. C.* 384—S. P. DICKINS *v.* JARVIS, E. T. 1826. K. B. 5 *B. & C.* 528; S. C. 8 *D. & R.* 285.

But no affidavit of enlargement necessary, where the order of reference and indorsement of enlargement have been made a rule of Court.

THE order of reference, with a memorandum indorsed, of the enlargement of the time by the arbitrator, had been made a rule of Court. On motion for an attachment, for non-performance of the award, it was contended, that, as this is a proceeding for contempt, it must appear that all the preliminaries, without which the attachment would not lie, must have been strictly complied with. By the order of reference the arbitrator has a day fixed for making his award, and also a power to enlarge the time. He has availed himself of that power, but there is no affidavit that he enlarged the time before the day first given had passed.

*Sed per Cur.*—We must assume that the rule was drawn up on the proper affidavits.

* And an affidavit of execution of a power of attorney, to make a demand of performance of an award, should be intituled in the cause. (*Coleridge*, J.—*Doe* d. *Clarke* v. *Stillwell*, H. T. 1838, B. C., 6 D. P. C. 305). But, in *Ex parte Imeson* v. *Horner*, (T. T. 1840, B. C., 8 D. P. C. 651), it was decided that when affidavits in arbitration matters, if there be no cause in court, describe the parties in the title after the names as "plaintiff" and "defendant," such words may be rejected as surplusage.

5. *Rule for.*

*In re* HOUGHTON, M. T. 1828. C. P. 2 *M. & P.* 452.

Rule for an attachment intituled A. & B., instead of A. plaintiff, and B. defendant, is insufficient*.

A RULE nisi for an attachment for non-payment of money pursuant to an award was intituled in the matter of A. & B., but the affidavit of service was intituled between A. B., plaintiff, and C. D., defendant. It was thereupon objected, that the affidavit was improperly intituled, as it should have been intituled the same as the rule. And of that opinion were the Court.

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BARTON *v.* RANSON, H. T. 1838. Ex. 3 *M. & W.* 322; S. C. 6 *D. P. C.* 384—S. P. SMITH *v.* REEVES, H. T. 1837. B. C. 5 *D. P.* C. 513.

And after rule granted, the Court will intend all was done necessary for its foundation.

A CAUSE, and all matters in difference, having been referred to arbitration, the arbitrator set out all the facts upon the face of his award, and then awarded that the plaintiff had no cause of action against the defendant, and stated that he determined the action in favour of the defendant. By the terms of the submission the arbitrator had power to enlarge the time for making his award. The order of reference, on which there was an indorsement enlarging the time, dated previously to the expiration of the time for making the award, was made a rule of Court. On motion for an attachment, without an affidavit that the time had been duly enlarged—

*Per Cur.*—We must assume that all was done which was requisite to obtain the rule.

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4th. BY MANDAMUS.

CORPE *v.* GLYN, T. T. 1832. K. B. 3 *B. & Ad.* 801.

A treasurer in whose name, by statute, actions were to be brought, which statute exempted him from personal liability, consented to a reference to arbitration:—Held, that no attachment lay against him; but a mandamus against the directors.

THE treasurer of a company incorporated by act of Parliament, in whose name the company are to sue and be sued, but whose body and goods are expressly exempted from the effects of process, having submitted matters to arbitration in two actions, and the arbitrator awarded in favour of the plaintiff with 2560*l.* damages and costs, and in the second action he awarded for the defendant, with costs. Motion was made for an attachment against the defendant in the first and the plaintiff in the second, for non-payment of the sums awarded, or for a mandamus to the treasurer and directors of the company to pay the same.

*Per Cur.*—No treasurer would ever submit to a reference if, by so doing, he incurred personal liability. You may have a mandamus returnable in eight days. When an act of Parliament shews so clearly the intention that a party shall not be personally answerable, we cannot grant an attachment.

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(*l*) AMENDMENT OF, AND SENDING IT BACK TO ARBITRATOR.

*Ex parte* CUERTON, H. T. 1826. K. B. 7 *D. & R.* 774.

The Court will not send back

ON motion for an arbitrator to revise his award, it appeared that the arbitrator made his award in the plaintiff's favour; but, in cal-

* On shewing cause against a rule for an attachment for non-performance of an award, reference cannot be made to the pleadings in the cause without an affidavit identifying them with the award. (*Coleridge*, J.—*Rowe* v. *Sawyer*, T. T. 1839, B. C., 7 D. P. C. 691).

culating the sum claimed to be due, he made a mistake in the amount of the sum which the plaintiff was supposed to be entitled to recover.

an award on the ground that the arbitrator has miscalculated the sum due.

The Court refused to interfere unless the defendant consented.

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HALL *v.* ALDERSON, H. T. 1825. C. P. 2 *Bing.* 476.

ON motion, calling on the Court to direct the arbitrator to alter his award, it was contended, that the Court was authorized to make the alteration under the precise and detailed directions for the arbitrator contained in the order of submission.

And the Court has no power to order an award to be amended consistent with the submission,

But no authority having been cited, the Court thought they had not power to interfere with the structure of the award.

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WARD *v.* DEAN, H. T. 1832. K. B. 3 *B. & Ad.* 234.

ON motion to amend an award, it appeared that an arbitrator awarded that the plaintiff had no cause of action, and that a verdict should be entered for the defendant, and then, by mistake, directed that the costs of the reference and award should be paid by the defendant, meaning the plaintiff.

or on its own view of the case; as where it awarded the costs to be paid by the "defendant," meaning the "plaintiff."

Held, that the arbitrator having executed his award in this form, could not rectify it.

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GENSHAM *v.* GERMAIN, M. T. 1825. C. P. 11 *Moore,* 1.

ON application to set aside an award—

The Court refused to refer it back, on the ground of its being shewn by affidavit that the arbitrator had allowed to the plaintiff, practising as an apothecary, charges for attendances.

So, an award cannot be sent back to the arbitrator for allowing charges not recoverable in law.

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FERGUSON *v.* NORMAN, M. T. 1837. C. P. 4 *Bing. N. S.* 52; S. C. 5 *Scott,* 304.

AN action against a pawnbroker for not complying with the requisites of the 39 & 40 Geo. 3, c. 99, s. 6, on receiving a pledge, was referred to an arbitrator, who was to state a case for the Court, and who having stated only one fact, and who, on reference to him, was unable to state whether the defendant had made the requisite inquiries or not, a rule was obtained, calling on the defendant to shew cause why the case should not be again referred to the arbitrator for the purpose of finding definitively, ay or no, whether the defendant had made the inquiries required by the statute. In answer to the rule, it was contended, that sufficient appeared before the Court to entitle the defendant to their judgment. It was for the plaintiff to impeach the conduct of the defendant; this he had not done, and, consequently all things were to be presumed rite acta, according to the doctrine that where any act is required to be done, the omission of which would make the person guilty of a criminal neglect of duty, the law presumes the affimative, and throws

But, where arbitrator is to state a case for the Court, unless the parties consent to the case being sent back to the arbitrator to rectify a mistake, a new trial will be granted.

* And even where an award against several did not shew how much costs each was to pay:—Held, no ground for sending it back to the arbitrator. (*Kynaston* v. *Liddell,* 8 Moore 223).

the burthen of proving the negative on the party who insists upon it. (*Williams* v. *The East India Company*, 3 East, 192).

The Court, however, being of opinion that enough had not been supplied to warrant them in coming to a conclusion, and having intimated that there should be a new trial or another reference to the arbitrator, the latter was preferred, and the rule was made absolute.

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LYNG *v.* SUTTON, E. T. 1836. C. P. 3 *Scott*, 187; S. C. 5 *D. P. C.* 39.

The application to send back the award should be before the first four days of the term.

ON an application to send the award back to the arbitrator, because he had omitted to make any award touching a point in equity, which was one of the matters in difference referred to him, it was contended that the motion was too late; it should have been made within the first four days of the ensuing term. (*Borrowdaile* v. *Hitchener*, 3 B. & P. Rep. 244).

*Per Cur.*—The application should have been made within the first four days. We ought to be very tenacious of relaxing the rule.

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### (*m*) SETTING ASIDE THE AWARD.

#### 1. *Within what Time**.

THOMPSON *v.* JENNINGS, H. T. 1825. C. P. 10 *Moore*, 110—S. P. SELL *v.* CARTER, M. T. 1833. Ex. 2 *D. P. C.* 245.

After verdict, motion to set aside an award made in vacation must be within first four days of the ensuing term,

AN action of trover was referred to an arbitrator to ascertain the amount of the damages the plaintiffs were entitled to recover, and on the 29th August last he awarded them 800*l.*, and stated the special circumstances as to the grounds of the deduction from the original verdict. At the end of the ensuing Michaelmas Term, an application was made to set it aside, on the ground of a miscalculation by the arbitrator, as well as a mistake as to the law of the case, as appeared on the face of the award.

But the Court held, that, although the limitations to set aside awards, as prescribed by the stat. 8 & 9 Will. 3, did not apply to awards made under orders at Nisi Prius, according to the case of *Synge* v. *Jervoise*, 8 East, 466; yet that this case fell within the principles of *Borrowdaile* v. *Hitchener*, 3 B. & P. 244, where it was decided that where a verdict is taken nominally, subject to a reference, and the award is made in vacation and before the term, it can only be impeached within the first four days of the following term.

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SELL *v.* CARTER, M. T. 1833. K. B. 2 *D. P. C.* 245.

even though it is for objections apparent on the face of it;

SEVERAL objections appeared on the face of the award in this case. On motion to set it aside, it was contended that, as the award was made in Easter Term, the motion ought to have been made within the first four days of Trinity Term.

The Court held, that the lateness of the application was a fatal objection.

* An action referred without a Judge's order is within the 8 & 9 Will. 3, with respect to the time for setting aside. (*Pattison*, J.—*Rushworth* v. *Barron*, H. T. 1835, B. C., 3 D. P. C. 317).

BENNETT *v.* SKARDON, M. T. 1829. K. B. 5 *M. & R.* 10—S. P. RAWSTHORN *v.* ARNOLD, E. T. 1827. K. B. 6 *B. & C.* 629; S. C. 9 *D. & R.* 556.

unless published too late in the vacation, when it may be set aside after the first four days;

ON motion to set aside an award, it appeared that the arbitrator made his award at Plymouth, 215 miles from London, on the 4th November, and thereby directed a verdict to be entered for the defendants. The plaintiff was advised that the award was bad in point of law. The examinations being very long, it was impossible for the plaintiff's attorney to consult his client to get ready a case for the opinion of counsel, and to obtain that opinion before the expiration of the first four days of the term.

The Court granted the rule.

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*In re* BURT, T. T. 1826. K. B. 5 *B. & C.* 668; S. C. 8 *D. & R.* 421.

for the purposes of setting aside an award, the time formerly related to the essoign day*.

ON motion to set aside an award, it appeared that the award was made after the essoign day, but before the quarto die post of Trinity Term.

The Court held, that all legal acts related to the former day, and not the latter, and that the award was to be deemed made within the term; and that an application made to set it aside in the following Michaelmas was in time.

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EMETT *v.* OGDEN, H. T. 1831. C. P. 7 *Bing.* 258—S. P. HAYWARD *v.* PHILLIPS, H. T. 1837. K. B. 6 *Ad. & E.* 119; S. C. 1 *N. & P.* 288.

Where there is no verdict, the motion must be made in the term next following the award;

THE award was made in October; and the defendant having applied to the plaintiff's attorney to make an affidavit as to the submission, with a view to an application, on his part, to set aside the award, and waiting the issue of that application, but which was never made, the plaintiff did not apply until the following January—

The Court held that it was too late, and the reason of delay insufficient.

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WORRALL *v.* DEANE, M. T. 1833. K. B. 2 *D. P. C.* 261—S. P. HOBBS *v.* FERRARS, T. T. 1840. Ex. 8 *D. P. C.* 779.

two terms after the making of it is too late†.

MOTION to set aside an award. It appeared that the award was made on the 8th April; since then, Easter and Trinity Terms elapsed.

*Per Cur.*—It appears you knew when the award was made, and you ought to have applied earlier. There is no sufficient reason stated for not coming sooner.

* This case was before the Uniformity Process Act.

† So, where a submission was not made a rule of Court until the second term after publication of the award:—Held, too late for an application to set it aside. (*Coleridge*, J.—*Reynolds* v. *Askew*, T. T. 1837. 5 D. P. C. 682).

A motion in the second term after the publication of the award is too late, although the opposite party may have improperly caused a portion of the delay by preventing the submission from being made a rule of Court. (*Coleridge*, J.—*In re Smith* v. *Blake*, M. T. 1839, B. C., 8 D. P. C. 133; *Perring* v. *Keymer*, 3 D. P. C. 98; and id. 317, 349).

M'Arthur *v.* Campbell, M. T. 1833. K. B. 2 *M. & N.* 444; S. C. 5 *B. & Ad.* 518.

even though the delay arose from the arbitrator demanding an excessive fee.

A motion to set aside an award under a Judge's order was made within the term ensuing the making of the award: the arbitrator had demanded an excessive fee; and a copy was not, in consequence, obtained by either party until a few days before the time when the application was made.

*Per Cur.*—The party has not applied to the Court within the proper time. The award was published in November; the motion to set aside was not made until Easter Term, but it ought to have been made, at the latest, in Hilary Term.

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Pilmore *v.* Hood, M. T. 1839. C. P. 8 *D. P. C.* 21; S. C. 8 *Scott*, 180.

So, Court will not interfere on ground of false statements made before arbitrator, where award is made in February and application not made till Michaelmas Term.

An action for falsely representing the returns of a public-house, whereby the plaintiff was induced to purchase it, was referred to arbitration. The arbitrator made his award, in the month of February, in favour of the defendant. In Michaelmas Term, the plaintiff applied to the Court to set aside the award, on the ground of certain false statements having been made before the arbitrator by one of the witnesses examined.

*Tindal*, C. J.—This is like moving for a new trial, on the ground that the verdict was against evidence, in a cause tried last February. It is clear that we cannot grant such an application.

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Hayward *v.* Phillips, H. T. 1837. K. B. 6 *Ad. & E.* 119; S. C. 1 *N. & P.* 288.

But, where an award was published more than four days before the end of Hilary Term—Held, Easter Term was not too late to apply to set it aside, *where all matters in difference were referred.*

A cause and all matters in dispute between landlord and tenant were referred. The award was made and published nine days before the end of Hilary Term, and directed the defendant to pay the plaintiff a certain sum of money, and the plaintiff to lay out a certain sum of money on the premises, which the defendant held as lessee of the plaintiff. In Easter Term, motion was made to set it aside.

*Per Cur.*—Where a cause and all matters in difference are referred, a motion may be made to disturb the award at any time during the next term; after the publication of the award. But the motion must be made within the first four days, when the cause only is referred and the arbitrator is put into the place of the jury.

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Doe *d.* Madkins, *v.* Horner, E. T. 1838. Q. B. 3 *N. & P.* 344; S. C. 8 *Ad. & E.* 164.

After judgment signed, without any attempt to set aside the award, the award may still be objected to*.

In an action of ejectment on two demises, all matters in difference in the cause were referred—costs of suit and of the reference to abide the event; the successful party to sign judgment and proceed for the costs as if the action had been tried. The arbitrator awarded that the plaintiff was entitled to a certain part of the lands, which he set out by metes, &c., and judgment was entered up without any

* But, after acceptance of costs of reference, it cannot be set aside. (*Kennard v. Harris*, 2 B. & C. 801; S. C. 4 D. & R. 272).

attempt to set aside the award. On motion to set aside the judgment—

The Court held, that the defendants were to be confined to objections on the face of the award, as if shewing cause against an attachment, but that the award was bad, as dealing only with part of the subject-matter in dispute.

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*2. Grounds for.*

WILLIAMS *v.* JONES, M. T. 1829. K. B. 5 *M. & R.* 3—S. P. ARMSTRONG *v.* MARSHALL, H. T. 1836. K. B. 4 *D. P. C.* 593.

An objection arising out of a collateral declaration of the arbitrator, no ground for setting aside the award.

A PREVIOUS award had been made. Upon another submission the day before the second award was published, the arbitrator wrote a letter to the plaintiff's attorney, stating that he felt himself bound to make an award in favour of the defendant, on the ground that the matter in dispute had arisen before the former reference; and that, although he thought the first arbitrator mistaken, he considered himself concluded by the award.

*Per Cur.*—The decision is binding, unless it appear on the face of the award, or of some paper annexed, that the arbitrator wishes to raise the question.

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BARRETT *v.* WILSON, M. T. 1834. Ex. 1 *C., M., & R.* 586; S. C. 5 *Tyrw.* 218; S. C. 3 *D. P. C.* 220.

The conclusion of the arbitrator will not be disturbed, if it appears from the facts stated there was any evidence to support it.

IN this case the arbitrator stated, in his award, that, in order that the parties might not be precluded from taking the opinion of the Court whether, in point of law, he had come to a right decision, he found certain facts for the opinion of the Court. On motion to set aside the award—

*Per Cur.*—We cannot interfere. If there were any evidence to support his conclusion, the only question is, whether there was any evidence which a Judge would have been justified in leaving to a jury.

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PERRYMAN *v.* STEGGALL, E. T. 1833. C. P. 9 *Bing.* 679; S. C. 3 *M & Scott*, 93; S. C. 2 *D. P. C.* 726—S. P. WADE *v.* MALPAS, E. T. 1834. Ex. 2 *D. P. C.* 638—S. P. ALLENBY *v.* PROUDLOCK, T. T. 1835. K. B. 4 *D. P. C.* 54.

Where the arbitrator is a barrister, a mistake in a point of law, is no ground for setting the award aside*.

IN an action on a promissory note a new trial was directed, on the ground that T. was an inadmissible witness. The cause was subsequently referred to the decision of a barrister, who admitted the evidence of T. On motion to set aside the award—

*Per Cur.*—When parties choose a lawyer as judge of the law, they must abide by his decision, unless they enter into a specific agreement to the contrary. No doubt the admissibility of T. was a question which required consideration; but as the arbitrator has decided it, we will not disturb his decision.

* Nor will the Courts interfere on the merits. (*Winter* v. *Lethbridge*, 13 Price, 553; S. C. 1 M'Clel. 253).

WILSON *v.* KING, E. T. 1834. Ex. 4 *Tyrw.* 997; S. C. 2 *C. & M.* 689.

Not for setting aside a certificate.

ON motion to set aside a certificate, it appeared that this cause and all matters in difference having been referred to a barrister to make his certificate, he certified that a verdict should be entered for the plaintiffs. The objection made to the certificate was, that it was against law.

*Sed per Cur.*—It is perfectly well settled that the opinion of an arbitrator binds both as to the fact and the law.

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PRICE *v.* JONES, H. T. 1828. Ex. 2 *Y. & J.* 114.

And expressions used by the arbitrators as to the law before award is not a ground.

A MISTAKE in point of law, by the arbitrator, did not appear upon the face of the award, but was brought before the Court by the affidavits filed in support of the rule, which stated, that the arbitrator had, before he made his award, intimated his opinion upon the law of the case.

*Per Alexander*, C. B.—The expression, by the arbitrator, of his opinion upon the law of the case, before he made his award, does not appear to me to be a sufficient reason to set aside this award. We are not apprised of the grounds upon which he proceeded, whether upon the evidence exclusively, or whether, upon further consideration, he altered his opinion upon the law of the case. Where the reasons appear upon the award itself, or are delivered by the arbitrator contemporaneously with the award, the Court are enabled to perceive the exact grounds upon which he proceeded.

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JAY *v.* BYLES, E. T. 1833. C. P. 3 *M. & Scott*, 86.

So if matters of law on the face of an award be correct, the Court will not examine the facts on which they are founded.

UPON a reference to a barrister, with liberty to state any points of law on his award, and he accordingly stated certain objections which were made before him, and which he stated he had overruled, but without referring to any state of facts—

*Per Cur.*—As the arbitrator's conclusion appears on the face of the award to be correct, we cannot interfere by examining the facts on which the law is founded.

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ASHTON *v.* POINTER, E. T. 1834. Ex. 2 *D. P. C.* 651—*Semble contra*, ASHTON *v.* POYNTER, M. T. 1834. Ex. 3 *D. P. C.* 201.

except where the arbitrator is not a barrister.

ON motion to set aside an award made by arbitrators not legal, on the grounds, 1st, that they were mistaken in law, and 2ndly, that the award was wrong on the facts—

*Sed per Cur.*—There may be a rule to shew cause why the award should not be set aside on the point of law only, because the arbitrators were non-legal arbitrators, but not upon the other.

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HUNTIG *v.* RALLING, M. T. 1840. Ex. 8 *D. P. C.* 879.

Though there is now no distinction between a professional and non-professional arbitrator

THE arbitrators in this case were merchants; they received evidence, which, in point of law, ought not to have been admitted. On motion to set aside the award on that ground, it was argued, that, as the arbitrators were unlearned persons, the Court would interfere.

*Sed per Alderson*, B.—I agree with the view taken by Lord *Eldon*, that there is no difference between a professional and non-professional arbitrator, whether as to law or fact, the parties having selected their own Judge.

respect to his decision.

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MORGAN *v.* MORGAN, M. T. 1832. Ex. 1 *D. P. C.* 611.

MOTION to set aside an award. It appeared that the arbitrator was indebted to the plaintiff in a large sum of money, and had been so for some years, and that that fact was concealed from the defendant, who objected to the arbitration going on, unless, at all events, some one was joined with him.

*Per Cur.*—No case has gone the length of saying that an award can be set aside because the arbitrator was indebted to one of the parties. It is certainly a matter of suspicion, but it is not of itself sufficient. No corruption is shewn.

An arbitrator owing one of the parties money, of which his opponent was not cognizant,

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SMITH *v.* SAINSBURY, T. T. 1832. C. P. 9 *Bing.* 31; S. C. 2 *M. & Scott*, 53.

A REFERENCE was made to a barrister, who examined the parties, by consent, subsequently to the award. It was discovered that the defendant was a felon convict; but it appeared that the judgment of the arbitrator was formed independently of the defendant's testimony. On motion to set aside the award—

*Per Cur.*—If the testimony of the defendant had been the evidence on which the arbitrator proceeded, it might have been necessary to consider whether it would have been a ground for entertaining this motion, but it appears that the judgment of the arbitrator was wholly independent of the testimony of either of the parties to the action.

or that a convict felon being a witness, if there be other sufficient testimony, does not invalidate the award*.

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PILMORE *v.* HOOD, M. T. 1839. C. P. 8 *Scott*, 180.

AN action for misrepresenting the value of the good-will of a public-house had been referred to an arbitrator, (see S. C. 6 Scott, 827), who had made his award. It was now sought to be set aside upon affidavit, by a witness, before the arbitrator, that misrepresentations had been made by him; and upon which the arbitrator had been influenced in his decision. More than two terms had elapsed since the making of the award, and the Court refused either to set aside the award or stay the proceedings.

The Court, however, appeared to disbelieve the statement of the deponent.

And it seems to be no ground for setting aside an award or staying proceedings, that the arbitrator has been imposed on as to the proofs.

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KINGWELL *v.* ELLIOTT, E. T. 1839. C. P. 7 *D. P. C.* 423.

ON motion to set aside an award, it appeared that the arbitrators, having learned, on Sunday, 2nd April, 1838, that the testimony of a witness would be material, and that the witness was going abroad immediately, summoned both parties to attend a meeting on the next day. Neither of them, however, appeared, and the arbitrators took the evidence in their absence, and it was not until

A meeting was improperly held, at which evidence was received, but afterwards struck out, as sworn to by the arbitrators; the Court

* And an objection to the presence of one of the parties, he having remained after, but did not come again, is no ground for setting aside the award. (*Wharton* v. *King*, T. T. 1831, N. P., 1 M. & Rob. 96).

refused to set aside the award.

another meeting was held that the parties stated that a notice of six days was required before a meeting could be held according to the terms of the submission, which had been sealed up. It was then agreed, that the evidence should be struck out: and the arbitrators now swore that they did not take it into their consideration in making their award.

*Per Cur.*—We cannot interfere. Notice was given to the parties that the evidence would be taken; and afterwards, upon objection being made, it was agreed that it should be struck out, and the arbitrators swear that it made no impression upon them.

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HOBBS *v.* FERRARS, T. T. 1840. Ex. 8 *D. P. C.* 779.

So, where after reference made, plaintiff became an insolvent debtor, the arbitrator proceeded, and gave notice to the plaintiff's attorney, who never attended, and the award was made ex parte; the Court refused to set aside the award at the instance of the assignee.

IN October, 1838, an action was brought and referred to arbitration under a Judge's order. Ultimately the plaintiff was arrested, and took the benefit of the Insolvent Act, in July 1839, and was discharged before award made. The arbitrator gave notices to the plaintiff's and defendant's attornies of his intention to proceed. No person, however, attended on behalf of the plaintiff, and the arbitrator made an award, ex parte, for the defendant. On motion to set aside the award at the instance of the assignee, because the arbitrator had proceeded in the absence of one of the parties—

*Per Cur.*—Regular notice was given to the plaintiff's attorney. It would be strange indeed for us to interfere because another party afterwards becomes interested in the award.—*Rule refused.*

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REX *v.* ST. KATHARINE'S DOCKS, M. T. 1832. K. B. 1 *N. & M.* 121.

So, where a claim was brought before an arbitrator, not included in the submission, nor adjudicated on, does not invalidate the award.

BY submission to arbitration, action and all matters in difference were referred. The award decided the former only.

The Court held, that it is no objection to the award that a claim not included in the action was brought before the arbitrator, and that he had not adjudicated thereon, unless it appear that the claim was not taken into consideration.

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DOE *d.* TURNBULL *v.* BROWN, E. T. 1826. K. B. 5 *B. & C.* 384; S. C. 8 *D. & R.* 100.

An award cannot be set aside merely because it directs what cannot be enforced without suit.

ON a reference to a barrister, by order of Nisi Prius, with power to direct how the verdict should be entered; and after a revocation, by notice in writing, he proceeded on the reference, and directed the verdict to be entered for the defendant,—

The Court distinguishing the case from that where nothing could be done on the award but by suit, as the defendant would be entitled to judgment, made a rule absolute for setting aside the award.

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PHIPPS *v.* INGRAM, E. T. 1835. Ex. 3 *D. P. C.* 669.

But the arbitrator refusing to examine all the witnesses a ground for setting aside.

A CAUSE respecting the value of a phaeton was referred to arbitration. The arbitrator was a coachmaker. At the first meeting before the arbitrator, the plaintiff brought with him seven witnesses, and requested that they might be examined; but the arbitrator, after inspecting the phaeton, said it was of no use to examine witnesses,

and ultimately made his award for the defendant. On motion to set aside the award—

*Per Cur.*—The arbitrator was bound to examine the plaintiff's witnesses.

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DIBBEN *v.* ANGLESEY, E. T. 1834. C. P. 10 *Bing.* 568; S. C. 2 *C. & M.* 722; S. C. 4 *Tyrw.* 926.

REFERENCE to arbitration of actions of trespass, in which there were several pleas of justification, setting up rights of common on the locus in quo. The arbitrator directed a verdict to be entered for the plaintiff in the first action, and in the second found that the defendants were not guilty of the trespasses, and directed a verdict to be entered accordingly. He took no notice of the other issues, nor did he further specify the mode in which the causes were to terminate. On a motion to set aside the award, it was objected that the arbitrator had not disposed of the causes.

So, an arbitrator not deciding upon a point called to his attention, may furnish a ground for setting aside the award.

*Per Cur.*—If either party wished to have a decision upon the special issues, with that view he should have distinctly requested the arbitrator to take that course.

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PAULL *v.* PAULL, H. T. 1834. Ex. 2 *D. P. C.* 340.

ON motion for an attachment for not performing award, it was objected, that the submission being of all matters in difference, the award appeared to be only respecting the matters in the cause, for it commenced by reciting, "Whereas this action was referred."

As under reference of an action, and all matters in dispute, award as to the action only, held bad on a motion to set it aside.

*Per Cur.*—There is merely a misrecital; and, in order to sustain such an objection, the party should have come to the Court to set aside the award, and should have shewn that there really were other matters in difference which were not decided upon by the arbitrators.

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*In the matter of* LEEMING and FEARNLEY, T. T. 1833. K. B. 5 *B. & Ad.* 403.

A REPLEVIN suit, and all matters in difference, touching the distress were referred to arbitration, the costs of the suit to abide the event. The arbitrator awarded, that the rent was 14*l.*, and that 6*l.* were due for rent, at the time of the distress, that the plaintiff in replevin should pay the defendant 6*l.*, and that the action should be no further prosecuted. It did not appear for what rent the defendant had avowed.

So, where costs are to abide the event, the award must distinctly dispose of them; if not, it may be set aside.

The Court held, that the award did not show who ought to pay the costs, which were to abide the event of the suit, and consequently that it was not final.

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JONES *v.* CORRY, H. T. 1839. C. P. 5 *Bing. N. S.* 187; S. C. 7 *D. P. C.* 299; S. C. 7 *Scott*, 106.

ACTIONS were brought against the defendants in their personal and representative capacity, which, with all matters in difference, were referred, by order of Nisi Prius, to a barrister; and it was also a condition of the order, that all matters in difference between the plaintiff and the heir at law of the testator should be referred in like manner; and the arbitrator, in his award, decided that the

If, after award made, the arbitrator, on inquiry, state reasons which shew his award to be erroneous,

it may be set aside on affidavit.

plaintiff had no claim whatever against the heir at law, but that a certain sum was due to the plaintiff by the defendants, though part of the work for which the demand was made, and to which the award referred, had been performed since the death of the testator. An inquiry was made of the arbitrator, [with the avowed purpose of bringing the matter before the Court,] as to the grounds of his decision, and he stated his idea of the jurisdiction given him by the Court, and of the principle on which he was bound to decide, which was erroneous.

Upon an affidavit stating these facts:—Held, that such disclosure by the arbitrator gave the Court authority to examine the award, and that the case formed an exception to those in which the parties referred the law and fact to an arbitrator, by whose decision they were consequently bound, and the grounds of which the Court would not examine.

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### Byrne *v.* Fitzhugh, M. T. 1834. Ex. 1 *C., M., & R.*, 597; S. C. 5 *Tyrw.* 221.

Under 4 & 5 Will. 4, c. 62, the Court of Exchequer will not set aside an award made in a cause in the Common Pleas of Lancaster.

On motion to set aside an award, made in a cause in the Common Pleas at Lancaster.—It was contended, that it might be done under the 4 & 5 Will. 4, c. 62, s. 26, by which it is enacted, "That it shall be lawful for any party, in any action now depending, or hereafter to be depending, in the said Court of Common Pleas, at Lancaster, to apply by motion to any one of the superior Courts at Westminster, sitting in Banco, within such period of time after the trial as motions of the like kind shall, from time to time, be permitted to be made in the said superior Court, for a rule to shew cause why a new trial should not be granted, or nonsuit set aside and a new trial had, or a verdict entered for the plaintiff, or defendant, or a nonsuit entered, as the case may be, in such action, which Court is hereby authorised and empowered to grant or refuse such rule."

But the Court held, that the 26th section of the 4 & 5 Will. 4, c. 62, did not authorise this Court to entertain such a motion, and refused to interfere.

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### Moore *v.* Butlin, M. T. 1837. Q. B. 2 *N. & P.* 436.

And where an arbitrator wrongly found an issue, the Court allowed the plaintiff to pay the costs of that issue instead of setting aside the award.

Assumpsit for goods sold, with counts for work, money paid, and on an account stated. Pleas to the whole declaration: 1st, of the general issue; and, 2nd, a set-off: to which latter plea the plaintiff replied nil debet. The cause and all matters in difference were referred. The arbitrator directed a verdict to be entered for the defendant on both pleas, as regarded the count for money paid, and as far as they related to the residue of the declaration, for the plaintiff, with £—— damages. On motion to set aside the award—

The Court held, that the issue on the plea of set-off was not divisible, and that the plaintiff was entitled to a verdict on it, unless the defendant proved a set-off equal to or exceeding the aggregate of the plaintiff's demands; but, although the arbitrator had been mistaken in his view of the pleading, the defendant was not entitled to avail himself of it to set aside the award; and the Court would discharge the rule on plaintiff's paying the costs of the issue so wrongly found for the defendant.

MACKAY, *In re*, M. T. 1834. K. B. 2 *Ad. & E.* 356.

A submission contained a clause, that no action or suit should be brought against the arbitrator: —Held, that the award might be set aside.

IN this submission there was a clause that no action or suit at law or in equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the said award, unless some collusion or other fraud be discovered or appear therein. On motion to set the award aside, it was contended that the motion was contrary to the agreement of the parties in the deed of submission.

*Sed per Cur.*—The clause introduced in the arbitration-bond to prevent impeaching the award is confined to actions and suits, and does not apply to this mode of disputing it.

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### 3. *Rule for.*

CHRISTIE *v.* HAMLET, M. T. 1828. C. P. 5 *Bing.* 195; S. C. 2 *M. & P.* 316—S. P. WHATLEY *v.* MORLAND, M. T. 1833. Ex. 2 *D. P. C.* 249—S. P. BOODLE *v.* DAVIES, E. T. 1835, K. B. 3 *Ad. & E.* 200; S. C. 4 *N. & M.* 788.

The rule nisi for setting aside an award must state the objections*, and be drawn up with reference to the rule authorizing the arbitration.

BY a Judge's order, made at Chambers upon hearing the attornies on both sides and by their consent, the cause was referred to arbitration. It was recited in the award that the cause was referred by an order of Nisi Prius.

*Per Cur.*—We are of opinion that an attachment cannot be issued against the defendants to enforce performance of the award, as no such order of Nisi Prius existed or was ever made as is recited in the award. But the rule for setting it aside should certainly have been drawn up on reading the order of reference, and the objections to the award should also have been stated in the rule.

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DICAS *v.* JAY, M. T. 1828. C. P. 5 *Bing.* 281; S. C. 2 *M. & P.* 448.

But, though the objections were not stated, the Court will go into them if they think proper.

IN assumpsit against an attorney for negligence in the conduct of a suit, the declaration contained several special counts and the usual money counts. The defendant paid money into Court sufficient to cover the plaintiff's demand on the latter counts. The cause being referred under an order of Nisi Prius, the arbitrator found that the plaintiff had good cause of action for a certain sum, and directed a verdict to be entered for him for such sum.

The Court held, that the award was sufficiently certain. Although the objections to an award should be stated in the rule nisi to set it aside; yet, if it be not done, the Court is not precluded from entering into any valid objection that may be raised to the award.

* By Rule T. T. 2 Geo. 4, rules nisi for setting aside an award must state the objection intended to be insisted upon. And the grounds of objection in a rule for setting aside an award must be stated specifically, and not in general terms. As, "that the arbitrator has exceeded his authority, and that the award is uncertain and not final," the reasons why should be stated. (*Coleridge, J.—Gray* v. *Leaf*, T. T. 1840, B. C., 8 D. P. C. 654).

CARMICHAEL *v.* HOUCHEN, H. T. 1834. K. B. 3 *N. & M.* 203—S. P. WHATLEY *v.* MORLAND, M. T. 1834. K. B. 2 *C. & M.* 347; S. C. 2 *D. P. C.* 249.

So, a rule for setting aside a certificate is within rule, E. T., 2 Geo. 4, requiring the objections to be stated*.

IN this case, the question was whether the rule of Easter Term, 2 Geo. 4, requiring the grounds of objection to an award to be stated upon a rule nisi to set it aside, applies to the certificate of an arbitrator empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly.

*Per Cur.*—We are disposed to think that the rule requiring the grounds of objection to be set out in the rule nisi, does apply in this case. We think that it is, in substance, an award.

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BARTON *v.* RANSOM, E. T. 1837. Ex. 5 *D. P. C.* 597—S. P. SHERY *v.* OKÉ, H. T. 1835. B. C. 3 *D. P. C.* 349.

A rule for setting aside must be drawn up on reading the award†.

ON motion to set aside an award, the rule was objected to because it was not drawn up on reading the award, when the officer reported that it was the practice to draw up the rule as it had been done.

*Sed per Cur.*—The rule must be discharged.

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DIPPINS *v.* MARQUIS OF ANGLESEA, E. T. 1834. Ex. 2 *D. P. C.* 647.

The counsel who objects to the award ought to begin where a rule to set aside is made into a special case.

A RULE to set aside an award was made into the form of a special case. On the question who was to begin—

*Per Cur.*—The party who objects to the award is to begin, and then the opposite counsel is to answer him, the same as if it had come on upon the rule first granted.

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4. *Effect of.*

WOOD *v.* DUNCAN, E. T. 1839. Ex. 7 *D. P. C.* 344.

Where an award is set aside, and, in consequence, a second trial takes place, the successful party is not entitled to the costs of the first.

A CAUSE had been referred to arbitration and the award was afterwards set aside. The cause was again tried, and a verdict found for the plaintiff. On the question, who was entitled to the costs of the first trial—

*Per Cur.*—*Poole* v. *Selwood*, 1 Price, 310, determined that, if a cause be referred, and the award in favour of the plaintiff be afterwards set aside, if he succeed on the second trial, he will be entitled to the costs of the first. That case was decided on the authority of *Burchall* v. *Bellamy*, 5 Burr. 2693, in which the Court directed, "That, for the future, in all cases where a cause goes down for trial, and goes off upon any occasion without the fault, contrivance, or management of the parties, and is afterwards brought down again for trial, the costs of such former abortive going down to trial shall

* In general, a rule for setting aside an award cannot be amended unless a mere technical objection. (*Patteson*, J.—*Shery* v. *Oke*, H. T. 1835, B. C., 3 D. P. C. 349).

† Where a rule to set aside an award under 9 & 10 Will. 3, c. 15, has been obtained, it cannot be amended by the production of an affidavit made on the last day of the term next after the award was published. (*Littledale*, J.—*In re Holloway & Monk*, M. T. 1839, B. C. 8 D. P. C. 138).

be taxed, and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a remanet.

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(*n*) Costs.

1. *General Rules.*

Rex *v.* Moate, H. T. 1832. K. B. 3 *B. & Ad.* 237.

The word "costs" in an order of reference does not apply to a special jury, or the costs of the reference and award;

Upon trial of an indictment for a nuisance before a special jury, it was agreed to be referred to a barrister; and that if he should be of opinion that there had been a nuisance, and also that, in point of law, the prosecutors were entitled to costs, the defendant agreed to consent to a verdict of guilty and to pay the costs, the arbitrator found specially that there had been a nuisance, and that the prosecutors were, by law, entitled to costs—

The Court held, first, that the Judge not having certified, nor the order of reference given the power to award them, the prosecutor was not entitled to recover the costs of the special jury; and, secondly, that the general term, "the costs," in the order could only be construed to mean such costs as the party would, under the rules of law, be entitled to, and could not extend to the costs of the reference and award.

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Tregoning *v.* Attenborough, E. T. 1831. C. P. 7 *Bing.* 733; S. C. 5 *M. & P.* 453; S. C. 1 *D. P. C.* 225.

and the costs of witnesses are costs in the cause.

In trover for goods the jury gave a verdict for their full value, and it was agreed by the defendant to take them back upon an allowance for deterioration to be ascertained by an arbitrator.

The Court held that the costs of witnesses attending him were properly costs in the cause.

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Bird *v.* Penrice, T. T. 1840. Ex. 8 *D. P. C.* 775.

The arbitrator is not bound to award distributively, so as to regulate the costs.

Declaration in assumpsit. 1st. Count for 200*l.* for horse keep. 2nd. Count for 200*l.* for goods sold. Pleas:—Non-assumpsit except as to 150*l.*; and, 2nd, payment of that sum. The cause being referred to arbitration, the arbitrator awarded that the 1st issue should be entered for the plaintiff with 14*l.* damages, and the 2nd for the defendant, as to the 150*l.*, and the residue for the plaintiff. On motion to set aside the award, because the arbitrator ought to have awarded distributively, so as to have regulated the costs—

The Court overruled the objection.

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Rigby *v.* Okell, T. T. 1827. K. B. 7 *B. & C.* 57.

And where one of the parties is to pay the costs of the cause, that will be construed to mean the same as if the cause had proceeded in the ordinary course.

A defendant had obtained a verdict on the trial; and, pending a rule for a new trial obtained by the plaintiff, the cause was referred, "the costs" being in the discretion of the arbitrator, and he found for the plaintiffs, and ordered the defendants to pay the "costs of the cause."

*Per Cur.*—We must understand the costs of the cause in that sense in which they would have been understood if there had been no reference but a new trial, and the verdict upon such second trial different from what it had been on the first trial. Now, where a

verdict is, on the first trial, found for the defendant, and on a second for the plaintiff, the latter is not entitled to the costs of the first trial. The arbitrator, when by his award he directed the defendants to pay the costs of the cause, must be understood to have intended those costs of the cause which the defendants would have been liable to pay if the cause had been tried a second time and a verdict had been found for the plaintiffs.

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HOCKEN *v.* GREENFELL, M. T. 1837. C. P. 4 *Bing. N. S.* 103; S. C. 5 *Scott*, 391; S. C. 6 *D. P. C.* 250.

The costs of a motion to set aside an award must be paid by the unsuccessful party*.

AN action for disturbance of a watercourse being referred, the arbitrator, by his award, regulated the future enjoyment. The defendant, acting upon a mistaken construction of the award, the plaintiff applied to the Court to set the award aside.

The Court held the award good, but the defendant's construction of it erroneous. The plaintiff claimed to have the costs of the rule, on the ground that the application to set aside the award was rendered necessary by the defendant's conduct.

*Sed per Cur.*—There was nothing in the present case to vary it from the ordinary rule; and the plaintiff's rule having been discharged, it followed as of course, that the defendant should have the costs of opposing it.

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MORGAN *v.* WILLIAMS, T. T. 1833. Ex. 2 *D. P. C.* 123.

Under a clause, if either party cause affected delay, he shall pay costs; not being prepared with evidence is within it.

IN this submission there was a clause that if either party should, by affected delay or otherwise, prevent the arbitrator from making his award, he should pay such costs to the other as the Court should think reasonable and just. The parties attended, but the plaintiff was not prepared with the books or witnesses necessary to prove his case, but was ready to have been examined himself, and, at his request, the meeting was adjourned; the plaintiff, however, did not afterwards attend, alleging that he could not procure the books, and refused to make another appointment; and before an award could be made the time expired, the arbitrator having no power to enlarge it.

*Per Cur.*—The plaintiff might have come better prepared. We think the plaintiff ought to pay the costs of the reference. He comes totally unprepared with the necessary proofs, an expense is uselessly incurred, and all falls to the ground, and the plaintiff positively refuses to make another appointment.

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RENNIE *v.* MILLS, H. T. 1839. C. P. 5 *Bing N. S.* 249; S. C. 7 *D. P. C.* 295; S. C. 7 *Scott*, 276.

If a cause be referred, and the declaration contains two counts, if it can be collected that the arbi-

THE plaintiff declared upon a special contract for the delivery of goods to the defendant, of which he alleged three breaches, which were—that the defendant did not pay for goods delivered according to agreement; that he refused to accept goods which were tendered; and as to the remainder, that he did not accept them. There was also a common count for goods sold. The cause was referred, and

* In the case, *Goodhall* v. *Ray*, (T. T. 1835, B. C., 4 D. P. C. 1), it was decided that the costs of a rule to set aside the award are costs in the cause.—*Coleridge*, J.

the arbitrator ordered the defendant to pay 75*l.*, less 39*l.* paid into Court on the 2nd count; and he also found that certain timber, mentioned in the special count, was the property of the plaintiff. The Master having taxed the costs on both issues, on a rule to revise the taxation, on the ground that the finding of the arbitrator was, upon the face of it, a finding upon the second count only—

trator considered both counts, that will be sufficient to regulate the taxation of costs.

*Per Cur.*—The language of the award is equally applicable to the special count and to that for goods sold and delivered; and there is nothing brought forward to shew that the Master has done wrong, or that the arbitrator did not mean that his award should extend to both counts.

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ASTLEY *v.* JOY, H. T. 1839. K. B. 1 *P. & D.* 460.

A CAUSE was referred, at the assizes, to a barrister to certify as to the verdict, without any special powers; he certified under 20*l.*, and also that it was a proper cause to be tried before a Judge of assize; but the Judge died without granting his certificate. On motion to the Court for that purpose, the case of *Nokes* v. *Frazer*, (3 D. P. C. 339), was cited, where it was held, that a Judge might grant the certificate in a case that was referred in Court.

Where a cause is referred at the trial, and the arbitrator is to award whether it was a fit cause to be tried before a Judge, with a view to a certificate for costs, and the Judge dies, the Court will not interfere.

*Sed per Cur.*—The case cited does not warrant us in granting this certificate. In the former, the judge exercised his judgment upon the knowledge of the case which he did possess. He might have even from the pleadings sufficient materials to enable him to do so. Here, however, he has not expressed any opinion whatever. If we were to accede to this application, we should be called upon to do so in cases where there is a reference by a Judge's order.

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WALLEN *v.* SMITH, M. T. 1837. Ex. 3 *M. & W.* 138; S. C. 6 *D. P. C.* 103.

IN an action for work and labour, referred to arbitration, the order of reference was, that the party in whose favour the award should be made was to be at liberty to enter up judgment for the sum awarded, as if a verdict had been obtained. The arbitrator awarded a sum under 20*l.* A question arising how the costs were to be taxed—

As, where a cause under 20*l.* was referred, and judgment was to be entered the same as if the cause had been tried: Held, that the costs must be according to the reduced scale.

*Per Cur.*—This must be treated as a recovery of less than 20*l.*, within the meaning of the directions to taxing officers. In general cases of reference to arbitration this decision will not operate as a hardship, because the parties may make it a term of the submission, that the arbitrator shall have in this respect the power of a Judge to grant a certificate.

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2. *When submission is silent respecting them.*

TAYLOR *v.* GORDON, H. T. 1833. C. P. 1 *D. P. C.* 720; S. C. 9 *Bing.* 570; S. C. 2 *M. & Scott*, 725.

REFERENCE under order at Nisi Prius, which empowers the arbitrator to direct for what sum the verdict should ultimately be entered, and decide upon various other matters in difference between the parties. It was also directed, that if either party, by wilful delay or otherwise, prevented the arbitrator from proceeding, he should pay such costs as the Court should think reasonable. No

Where no mention is made as to costs, each party must pay his own;

other direction was given in the order as to costs. The arbitrator directed the defendant to pay a sum beyond that brought into Court, and that each party should pay his own costs of the arbitration, and that the expense of the award should be paid equally between them.

And the Court said, In cases of reference the general rule is, that where the order of Nisi Prius is silent as to the costs of the reference and award, the arbitrator has no power to adjudicate upon them, but each party must bear his own expenses and half the costs of the award.

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STRATTON *v.* GREEN, E. T. 1832. C. P. 8 *Bing.* 437; S. C. 1 *M. & Scott*, 668.

unless money has been paid into Court, when defendant is entitled to costs up to that time.

AFTER payment of a sum into Court the parties submitted to arbitrators to balance their accounts, and settle all matters in dispute, held, that the submission being silent as to costs the arbitrators had no power to direct each party to pay his own costs, and that the plaintiff was entitled to his costs up to the time of payment into Court.

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BOODLE *v.* DAVIES, E. T. 1835. K. B. 3 *Ad. & E.* 200; S. C. 4 *N. & M.* 788.

If all the matters referred be not decided on, each party pays his own costs.

BY an agreement of reference between A. and B., which stated that A. claimed a yard and pump therein as his exclusive property. But that B. had, after notice not to do so, entered the yard and taken water from the pump, and that there was a ditch dividing the lands of A. and B., which A. alleged that B. had removed into his (A.'s) lands. All matters in difference were referred to C., who was further empowered to direct how, and by whom, and in what manner the yard, and pump, and hedge, and ditch, should thereafter be enjoyed and occupied, and who should have the care and management thereof. C. awarded that the yard and pump were the sole and exclusive property of A.; and, except that B. had a right to take water from the pump, and to have ingress and egress to and from the yard for that purpose, and further, that the pump should thereafter be considered as belonging to A. and B. jointly, and to be repaired at their joint expense, and that B. had not removed the hedge and ditch into A.'s land, but that thereafter the hedge should be kept in repair by B., who, for that purpose, should be at liberty to take mud from the ditch, but that, subject to such privilege, the ditch should thereafter be considered as the exclusive property of A.; the costs were to abide the event.

The Court held, that as C. did not decide all the matters referred to him in favour of one party, the plaintiff and defendant must pay their own respective costs.

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HALLEN *v.* SMITH, E. T. 1839. Ex. 7 *D. P. C.* 394.

However, unless the power be reserved the arbitrator cannot certify that the cause was fit to be tried before a Judge at Nisi Prius.

THE cause had been referred to arbitration, and the sum awarded being under 20*l.*, the costs were taxed upon the lower scale. The arbitrator had no power to grant a certificate that it was a fit cause to be tried before a Judge of the superior Courts. A rule nisi was obtained for the Master to review his taxation, and tax the costs between attorney and client upon the higher scale.

*Per Cur.*—Where a case at Nisi Prius is referred to arbitration

care should be taken to give the arbitrator the same power of certifying as the Judge at Nisi Prius would have had. We believe that this is the first instance in which this difficulty has occurred with respect to an award, and, as it would be a hardship to deprive the attorney of his fair costs, if they can be allowed, we think the Master may use a liberal discretion.

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### 3. *Where they are to abide the event of a reference.*

SPIVY *v.* WEBSTER, E. T. 1833. Ex. 2 *D. P. C.* 46.

THIS action was referred, and the costs were to abide the event. The arbitrator awarded that the plaintiff had no cause of action, and was not entitled to recover, and he ordered the suit to be discontinued.

The word "costs" in a reference, where they are to abide the event, means the legal event,

*Per Cur.*—By the terms of the submission the costs were to abide the event, which must mean the legal event. The plaintiff is therefore liable to the costs.

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THOMPSON *v.* ATKINSON, H. T. 1827. K. B. 6 *B. & C.* 193.

BY an order of reference the costs in a cause are directed to abide the event of the award, and the arbitrator awards damages to the defendant in compensation for an arrest, and holding to bail without reasonable or probable cause for a sum larger than was actually due. On rule to shew why the defendant should not be allowed his costs of suit to be taxed by the Master, pursuant to the stat. 43 Geo. 3, c. 46,

but not to comprehend a power to give costs, under 43 Geo. 3, c. 46.

The Court held, that the matter having been taken into consideration by the arbitrator, the plaintiff must be taken to have consented to refer the cause, on condition of the costs abiding the event, and therefore, on that ground, refused an application by the defendant for costs, under 43 Geo. 3, c. 46.

See 3 *D. P. C.* 606.

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JUPP *v.* GRAYSON, M. T. 1834. Ex. 1 *C., M. & R.* 523; S. C. 5 *Tyrw.* 150; S. C. 3 *D. P. C.* 199—S. P. GREENWOOD *v.* JOHNSON, E. T. 1835. B. C. 3 *D. P. C.* 606.

THE costs of the suits, and of the reference and award, were to abide the event. The arbitrators named an umpire, who made his award, but made no mention of the costs. On motion to set aside the award, on the ground of there being no adjudication as to the costs, but merely as to the damages,

If costs of action and reference are to abide the event, the award need not notice them.

*Per Cur.*—There is nothing in the objection as to the costs, no power is given to the arbitrators.

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REEVES *v.* M'GREGOR, H. T. 1839. Q. B. 1 *P. & D.* 372—S. P. READ *v.* MASSIE, 1836. Ex. 4 *D. P. C.* 681.

A CAUSE, and all matters in difference, including a suit in equity, were referred to an arbitrator, the costs of the cause and of the suit to abide the event of the award. The costs of the reference were to be in the discretion of the arbitrator. The suit in equity was, among other things, for an injunction to stay the cause at law. The arbitrator awarded on several of the issues in the cause for the

The arbitrator may exercise a power over the costs, necessarily resulting from the nature of the reference.

plaintiff, with 5*l.* damages; on others he awarded for the defendant, and, so far as the suit applied to the latter issues he decided for the plaintiff, but awarded that the defendant was entitled to relief, in respect of the issues found for the plaintiff; the costs of the suit and cause to be borne by the respective parties. He ordered that proceedings in the suit should cease, and that the plaintiff should not take out execution for his damages or costs. The costs of the reference were to be borne by the respective parties.

The Court held, that the arbitrator did not exceed his authority in staying the plaintiff from recovering his costs; because, although he thereby exercised a jurisdiction over the costs of the cause, it was the exercise of a power necessarily resulting from the nature of the reference.

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NORRIS *v.* DANIEL, E. T. 1834. C. P. 10 *Bing.* 507; S. C. 4 *M. & Scott*, 383; S. C. 2 *D. P. C.* 798.

Where costs are to abide the event, the award must shew the result, so as to regulate the costs.

PLAINTIFF and defendant agreed, under a rule of Court, to leave the cause of action, and all matters in dispute, to arbitrators, whose decision was to be final, and costs were to abide the event. The arbitrators award that the plaintiff had just cause of action upon some counts of his declaration, and are silent as to the others. They also find that plaintiff is entitled to 5*l.* damages and his costs, and that both parties should give mutual releases of all causes of action. On motion to set aside the award, it was argued, that the condition of the submission had not been complied with. The costs were to abide a certain event, which, from the imperfect nature of the award, has not taken place. By the terms of the submission, the exercise of any discretion upon the subject was denied to the arbitrators; and yet, by their omitting to make any award as to some of the counts, and consequently rendering it impossible for the officer to tax the costs of such counts for either party, they have assumed that discretion which the parties seem studiously to have withheld.

And of that opinion were the Court, and set aside the award.

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YATES *v.* KNIGHT, M. T. 1835. C. P. 2 *Bing. N. S.* 277; S. C. 2 *Scott*, 470.

Where award partly in favour of each party, held, that each must pay his own costs*.

CERTAIN matters in difference having been referred to arbitration, the costs to abide the result of the award, the arbitrator awarded that one of the parties was entitled to a certain quantity of flints and the other to a sum of money; but he said nothing as to costs. On motion to set aside the award, it was argued that the award was uncertain as to the party by whom the costs were to be paid, and therefore bad.

*Sed per Cur.*—The costs, by the terms of the rule, were to abide the result of the award, which was partly for one and partly for the other. This, it is not denied, is good. The arbitrator had no authority over the costs; they were to abide the result of the award, which being, as has been before observed, partly for one and partly for the other, each should pay his own costs.

* But where several actions were referred, costs to abide the event, on each action the arbitrator awarded costs to the successful party—held good. (*Coleridge*, J. —*Jones* v. *Powell*, E. T. 1838, B. C., 6 D. P. C. 483).

DOE *d.* OXENDEN *v.* CROPPER, T. T. 1839. K. B. 2 *P. & D.* 490.

AN action of ejectment having been referred, the costs to abide the event of the award, the arbitrator awarded generally that a verdict should be entered for the plaintiff, and delivered, at the same time, a paper containing the grounds of his award; in which he expressed his opinion, that the plaintiff was entitled to recover a portion only of the premises comprised in the declaration.

Where costs are to abide the event, and the award contains an exception, no costs will be given, so far as relates to the exception.

The Court refused to direct the Master to refuse the lessor of the plaintiff his costs, except as to the portion so designated by the arbitrator, or to amend the postea, by confining it to that portion.

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CHITTENDEN *v.* WALKER, T. T. 1835. K. B. 3 *Ad. & E.* 691.

UPON a submission of all matters in difference to an arbitrator, with power to him to direct a verdict or nonsuit, and to order the defendant, although there should be a nonsuit or a verdict for him, to pay any money or do any other act which should be just and equitable; the costs of the suit and the costs of the reference to abide and follow the event of the award. The arbitrator directed a nonsuit; but awarded that the defendant ought to pay the plaintiff 25*l.*, and ordered him to do so. On taxation of costs, the Master allowed the plaintiff his costs of the reference, and allowed the defendant no costs either of the reference or of the action. On motion to review the taxation—

So, where plaintiff was nonsuited, but defendant ordered to pay a sum to the plaintiff—held, that the defendant was entitled to the costs of the action, but the plaintiff to the costs of the reference;

*Per Cur.*—We think he must; and that the plaintiff ought to have the costs of the reference on which he has succeeded, and the defendant those of the action which has been found not maintainable.

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RADCLIFFE *v.* HALL, E. T. 1835. Ex. 3 *D. P. C.* 802.

IN an action for a nuisance for diverting a watercourse, the general issue only was pleaded*. All matters in difference were referred to an arbitrator, the costs of the cause to abide the event; and he awarded a nonsuit to be entered, because the defendant was not proved to have committed the injury; but decided the right in favour of the plaintiff. On the question, whether the defendant was entitled to the costs of all his witnesses to the time of trial, as well as those who negatived his committing of the act as those who came to establish his right—

but, in an action for a nuisance, arbitrator directed plaintiff to be nonsuited, but defendant to remove the nuisance; defendant is entitled to costs*.

The Court held the award to be a substantial finding for the defendant, and that he was entitled to the costs of all the witnesses who were material under the issue; but that the Master could not allow more than the actual travelling expenses.

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DAWSON *v.* GARRETT, E. T. 1834. Ex. 2 *D. P. C.* 624.

FROM the award it appeared that the action was brought to recover a sum of money, and that 10*l.* had been paid into Court, and that the parties had consented to refer the action and all matters in

So, where he has paid money into Court

* This case was before Rules H. T. 4 Will. 4.

equal to the amount awarded.

difference, and that the costs of the action and the costs of the award were to abide the event of the award, which was in these terms: "I do award that the plaintiff, at the time of the commencement of the action, had no cause of action, save and except 10*l.* lent by him to Hannah, the wife of the defendant, when sole, and that I find has been brought into Court." The award was treated as being in favour of the defendant, and the Master taxed the costs for him.

And the Court held the taxation right.

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4. *Where they are in the discretion of the Arbitrator.*

SECCOMBE *v.* BABB, H. T. 1840. Ex. 6 *M. & W.* 129; S. C. 8 *D. P. C.* 167, *by name of* SECKHAM *v.* BABB.

Where costs of the action and the reference are to be in the discretion of the arbitrator, he cannot award costs as between attorney and client; and if he do, the whole award is bad*.

REFERENCE of cause on the terms of the costs of the action; and also the reference and award incident thereto to be in the discretion of the arbitrator. He awarded that the action should cease and no further proceedings be taken. However, that the defendant should pay to the plaintiff 50*l.* towards the costs of the cause and the reference; that the plaintiff should pay his own and the defendant's costs of the cause and reference; the said costs to be taxed as between attorney and client, and that the plaintiff should pay the arbitrator 25*l.* for his fees, &c.

*Per Cur.*—The award of the costs as between attorney and client is clearly an excess of the referee's power, and is so connected with the other part of the award as not to be capable of separation, so as to allow any part of the award to stand.

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5. *Set-off, of*

CADELL *v.* SMART, H. T. 1836. Ex. 4 *D. P. C.* 760; S. C. 1 *Tyrw. & G.* 475.

Set-off of costs can only be subject to the lien of the attorney;

A CAUSE and all matters in difference having been referred, and the arbitrator having ordered a verdict to be entered for the defendant, but found that the defendant was indebted to the plaintiff on other accounts—

The Court allowed the costs of a cause to be set-off against a sum due from the defendant to the plaintiff on another account, but subject to the lien of the plaintiff's attorney.

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DOE *d.* SWINTON *v.* SINCLAIR, E. T. 1836. C. P. 3 *Scott*, 42; S. C. 5 *D. P. C.* 26.

as, where arbitrator awarded a verdict for the plaintiff, but a sum to be paid by the plaintiff to the defendant—held, that

AN action of ejectment and all matters in difference between the parties was referred to arbitration. The arbitrator awarded the verdict to be entered for the lessor of the plaintiff, but also awarded two sums to be paid by the plaintiff to the defendant as compensation for buildings erected on the premises. On the question whether the sums awarded to the defendant might be set off against the claim of the plaintiff for costs—

* Where an arbitrator, who had the same power as the Court as to costs, took no notice of an arrest under the 43 Geo. 3, the Court refused to interfere. (*Williams*, J.—*Greenwood* v. *Johnson*, E. T. 1835, B. C., 3 D. P. C. 606).

The Court directed the sum awarded to the defendants to be set off against the costs of the lessor of the plaintiff, saving the lien of their attorney.

the defendant may set-off that sum against the plaintiff's costs, subject to his attorney's lien.

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### 6. *Taxation of Costs.*

UTTING *v.* EVANS, H. T. 1824. Ex. 1 *M'Clel.* 12.

IN this case three actions had been brought by the same plaintiff against the same defendant, and referred to arbitration, the costs of the reference were awarded to be equally borne by the parties, and the Master, on taxation, allowed the defendant, as costs of reference, two distinct sums for the attendance, loss of time, and travelling expenses of the same witnesses in two different actions, and made no allowance to the plaintiff for a sum sworn to have been paid by him to the arbitrator as costs of the reference. On a rule nisi for reviewing the taxation—

Upon taxation of costs after an award, the Court will not revise the taxation where the objection was not taken at the time of taxation.

The Court discharged the rule, the amount claimed by the plaintiff, as paid to the arbitrator, not appearing in the plaintiff's bill produced before the Master, and no objection having been made at the taxation.

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DICKINS *v.* JARVIS, E. T. 1826. K. B. 5 *B. & C.* 528; S. C. 8 *D. & R.* 285, *by name of* DICKINS *v.* SMITH.

UPON reference, at Nisi Prius, of the cause and all matters in difference, costs to abide the event, with power to enlarge the time, the arbitrator awarded that nothing is due to the plaintiff. One of two defendants only attended the arbitrator and took part in the reference, and the Master taxed for the other defendant the whole of the costs of the cause and of the reference jointly, which were demanded of plaintiff.

It seems, under a joint reference by two defendants, the costs should be taxed jointly.

The Court held, that, admitting (which was unquestionable) that the costs of the cause might have been taxed jointly, and if the costs of the reference had been taxed separately, that the defendant might have demanded the one for himself and the other for himself and his co-defendant; that, under the circumstances, no attachment could be granted.

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### 7. *Remedy for.*

DUCKWORTH *v.* HARRISON, M. T. 1838. Ex. 4 *M. & W.* 432.

A CAUSE was referred to arbitration by agreement, and the costs of the reference were to abide the event of the award; but there was no provision as to the costs of the action. There were issues in the cause upon pleas of the general issue and set-off. The arbitrator found that the plaintiff was not entitled to recover, and that he had not any cause of action. In an action brought to recover the costs of this award, the declaration stated that the event of it was in the plaintiff's favour, and that the costs of the award were taxed and allowed, and amounted to a sum named. The plea denied that any sum was taxed, and allowed for such costs. On demurrer—

An action lies by the party in whose favour an award is made, for the costs of the reference and award.

The plea was held bad, as traversing an immaterial allegation.

Archdeacon.—See tit. *Ecclesiastical Persons.*

## Army and Navy*.

(2 *Peters. Abr.* 269).

*In re* Poe, M. T. 1833. K. B. 5 *B. & Ad.* 681; S. C. 2 *N. & M.* 636.

The right to a prohibition ceases after an officer in the army has been tried by a court-martial and the sentence carried into effect.

A commission for holding a court-martial had been issued, and a party had been found guilty upon certain charges which had been exhibited against him, and he had been sentenced to be dismissed; and that sentence had been ratified and allowed by the King. On motion for a prohibition—

The Court said, they could not understand why a prohibition should be granted, to whom it should be directed, or what they were to prohibit; for not only had the sentence been carried into complete execution, but the court-martial itself had ceased to exist. Counsel, however, argued that it might be directed against the Judge-Advocate, on the authority of the case of *Grant* v. *Gould* (2 H. Bl. 69). We might here observe, that the rule there was discharged, on the ground that no valid objection could be found to the proceedings of the court-martial. It is not easy to see what power the Judge-Advocate could possess after the sentence had been pronounced and ratified by his Majesty in the ordinary execution of the sentence. This case clearly falls short of the purpose for which it was cited, as the sentence there was not fully executed. A court-martial stands upon grounds peculiar to itself; when it has pronounced its sentence its functions are at an end, and when its sentence is transmitted to the King, and the King has ratified it, nothing remains to be done. It is impossible to discover what the Judge-Advocate could be required to abstain from.

Man *v.* Owen, E. T. 1829. K. B. 4 *M. & R.* 449; S. C. 9 *B. & C.* 595.

Under the 22 Geo. 2, c. 33, a purser in the navy, charged with making false entries in the ship's books for the purposes of fraud, is liable to be tried by a naval court-martial.

To trespass and false imprisonment against the president of a naval court-martial the defendant pleaded, that the plaintiff was a person in and belonging to the fleet of our lord the King, and in actual service and full pay in the said fleet, namely, an officer in and of his Majesty's naval service, to wit, a purser in his said Majesty's naval service; and, as such officer and purser, was employed in his said Majesty's naval service as purser of a certain ship of war of his said Majesty, to wit, the ship Perseus; and that plaintiff being such officer and purser in such actual service and full pay, and so employed before the said time when, &c., on board the ship Perseus, the same then being within the jurisdiction of the Admiralty of England, committed and was guilty of a certain offence and breach of his duty, as such officer and purser, cognizable by a naval court-

* In order to make a man, inrolled as a volunteer, an effective member of his corps, he need not take the oath of allegiance required by the Volunteer Act, 44 Geo. 3, c. 54. (*Rex* v. *Whitnesham*, H. T. 1835, K. B., 2 Ad. & E. 648; S. C. 4 N. & M. 447; Abr. post, tit. *Settlement*).

martial, to wit, of fraudulently and unlawfully charging twenty-six blankets against twenty-six supernumerary seamen, to whom none had been issued; and of making, in order to such fraudulent charge, certain false entries in a certain book of the said ship Perseus. The plea then stated, that a court-martial was held on defendant; and the Court was of opinion that the charge of the said offence had been proved against the plaintiff; and, in consequence thereof, did adjudge him to be dismissed from his Majesty's service and rendered incapable of ever serving as a purser in the navy of his Majesty his heirs and successors; that the defendants, with the other members of the court-martial, did, within the Admiralty jurisdiction, cause the plaintiff to be taken into custody with no unnecessary violence, and detained on board the said ship, during his trial, for the purpose of such trial, as they lawfully might, for the cause aforesaid. The plea was proved in evidence, and the plaintiff nonsuited. On motion to set it aside—

The Court held, that the plea was good, being an offence clearly within the 36th naval article of war, mentioned in 22 Geo. 2, c. 23, and punishable by a court-martial; the word crime there used not being to be construed as something higher than a misdemeanour, but having the same meaning as offence.

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BRADLEY *v.* ARTHUR, T. T. 1825. K. B. 4 *B. & C.* 292; S. C. 6 *D. & R.* 413.

Where a governor is appointed civilly, and military, to take the command of all persons armed, his right to command continues though his own regiment be disbanded.

THE defendant, whilst holding a commission in a regiment, was appointed by the governor (J.) to be superintendant at H., which was in the nature of a civil appointment; and he was, at the same time, appointed by the general in command to take upon him the command of all persons armed or to be armed in defence of the settlers at H.; and having put under arrest, for disobedience of orders, a commissioned officer on full pay, holding equal regimental rank with himself, he brought an action for false imprisonment.

The Court held, that the appointment to take the command of all armed persons imported, that he was to take the military command of the soldiers as well as others; and that, having been well appointed in the first instance, his authority continued, notwithstanding the disbanding of his own regiment, until put an end to by the appointment by the Crown of some other person or withdrawing of him.

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# Arrest*.

See tits. *Affidavit to hold to Bail—Ambassador—Bankrupt—Barrister—Detainer—Husband and Wife—Insolvent Debtor—Outlawry—Peer.*

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I. WHEN OR WHEN NOT ALLOWED UNDER 1 & 2 VICT. C. 110, p. 371.

II. OF THE CAUSE OF ACTION FOR WHICH A PARTY MAY OR MAY NOT BE ARRESTED.

* The power of arrest on mesne process being substantially abolished by the 1 & 2 Vict. c. 110, (post), it has been deemed advisable to insert the cases before the passing of that statute in notes.

(*a*) In general, p. 373.
(*b*) Sum requisite to authorize an arrest, p. 373.
(*c*) On debts contracted abroad and in Scotland, p. 373.
(*d*) Effect of arresting for too large an amount under 43 Geo. 3, p. 373.

III. AT WHOSE SUIT ARREST MAY BE MADE, p. 375.

IV. WHO MAY OR MAY NOT BE ARRESTED.

(*a*) Personal exemption from arrest, p. 375.
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VI. SECOND ARREST FOR THE SAME CAUSE OF ACTION.

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(*b*) After prior arrest in a foreign country, and Ireland, p. 377.
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(*g*) After death of plaintiff by his representative, p. 377.
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VII. CONSEQUENCES OF ARRESTING PRIVILEGED PERSONS, p. 377.

VIII. OF THE DISCHARGE FROM.

(*a*) In general, p. 378.
(*b*) Under 1 Vict. c. 110, p. 378.

IX. OF THE ARREST.

(*a*) Of the 1 & 2 Vict. c. 110, p. 380.
(*b*) Of the warrant, p. 380.
(*c*) Of the manner and place of the arrest, p. 380.
(*d*) Sheriff and his officers' duty after, p. 381.

X. OF GIVING BAIL TO THE SHERIFF—See tit. *Bail.*

XI. IN INFERIOR COURTS, p. 382.

## I. WHEN OR WHEN NOT ALLOWED, UNDER THE 1 & 2 VICT. c. 110.

Arrests on mesne process in any inferior or superior Court are prohibited,

THE 1st section, after reciting that the present power of arrest upon Mesne Process is unnecessarily extensive and severe, and ought to be relaxed, enacts, "That from and after the time appointed for the commencement of this act, no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner hereinafter provided for), in any superior Court."

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without a Judge's order, grounded on an affidavit disclosing such facts as shew that the defendant is "about to quit England."

BY section 3rd, it is enacted, "That, if a plaintiff in any action, in any of her Majesty's superior Courts of law at Westminster in which the defendant is now liable to arrest, whether upon the order of a Judge, or without such order, shall, by the affidavit of himself, or of some other person, shew, to the satisfaction of a Judge of one of the said superior Courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of twenty pounds, or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt, or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias, into one or more different counties, as the case may require, against any such defendant so directed to be held to bail: which writ of capias shall be in the form contained in the schedule to this act, annexed, and shall bear date on the day on which the same shall be issued; provided, always, that the said writ of capias, and all writs of execution, to be issued out of the superior Courts of law at Westminster, into the counties palatine of Lancaster and Durham, shall be directed to the Chancellor of the county palatine of Lancaster, or his deputy there, or to the Chancellor of the county palatine of Durham, or his deputy there."

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Which order may be made at any time before final judgment.

BY section 5th, it is enacted, "That any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant, in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith."

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But all actions are to be commenced by summons.

BY section 2nd, it is enacted, "That all personal actions in her Majesty's superior Courts of law at Westminster shall be commenced by writ of summons."

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LARCHIN *v.* WILLAN, M. T. 1838. Ex. 4 *M. & W.* 351; S. C. 7 *D. P. C.* 11.

Under this sta-

*Gurney*, B., had made an order at Chambers, that the defendant

tute the criterion is, whether the defendant is about to leave England for a mere temporary purpose, or for so long as would prejudice the plaintiff*.

should be arrested upon mesne process, under the 3rd section of 1 & 2 Vict., c. 110, upon an affidavit, which stated that he was an officer in the army, and had held a commission in the Scotch Fusileer Guards, but was now in the 25th regiment of foot; and that, upon inquiry, at Messrs. Greenwood & Co.'s, army agents, it was ascertained that he was about to sell out of the army and go abroad, and that it was his intention to quit England, unless he was immediately apprehended. On motion to rescind the order, defendant made an affidavit in answer, which contradicted the statement that the defendant was about to sell out of his regiment and quit England; and further stated, that his regiment was then quartered in Ireland, from which he was absent upon leave, but that he expected soon to have to join it there, in obedience to the commands of his superior officer, and to go upon duty again; and further, that an officer upon full pay had it not in his power to go abroad. It was then contended that it had been decided by *Tindal*, C. J., and *Coltman*, J., at chambers, that a mere departure from England upon duty was not such a leaving of England as the section had in view, and they refused to make an order for an arrest.

*Per Cur.*—It appears from the defendant's affidavit, that the defendant is about to quit England to join his regiment, and the principle to be applied in these cases is, that, if a party be about to quit England, unless it be for so temporary a purpose as can occasion no delay or prejudice to the creditor, he is within the meaning of the 3rd section. We should have been disposed to have granted this rule out of respect for the decision of *Coltman*, J., and the concurrence in it of *Tindal*, C. J., but while this discussion has been going on we have had an opportunity of consulting with one of the learned Judges who refused to make such order, who is now of opinion that, in the case referred to there was sufficient ground for making an order for the arrest.

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BALL *v.* STANLEY, E. T. 1840. Ex. 6 *M. & W.* 396.

But, after a Judge's order to stay proceedings for a fixed time, the plaintiff cannot arrest under 1 & 2 Vict.

BY consent, a Judge at Chambers ordered, that, upon payment of debt and costs in six months, the costs to be paid down, all further proceedings in the cause should be stayed. The defendant paid the costs down, in conformity with the order. Soon afterwards plaintiff had reason to believe that the defendant was about to leave the country, and applied for an order to arrest, under 1 & 2 Vict.

*Per Cur.*—The order cannot be granted. The Judge's order is in effect the same thing as if the defendant originally had good consideration for six months' credit for the debt. Besides, the effect of the order is to suspend all proceedings until after the expiration of six months.

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BODDINGTON *v.* WOODLEY, M. T. 1838. Q. B. 8 *A. & E.* 925; S. C. 1 *P. & D.* 159.

And, under 1 & 2 Vict. c. 110, s. 7, the Judge's order

THE defendant being in custody, an application was made to a Judge at Chambers to discharge him, under 7th sect. 1 & 2 Vict. c. 110, on entering a common appearance. This was opposed, upon the ground that the defendant intended to quit England; and the

* At all events, mere suspicion that a defendant is about to leave England is not sufficient to authorize an arrest. (*Coleridge*, J.—*Harvey* v. *O'Meara*, T. T. 1839, B. C., 7 D. P. C. 725).

Judge made an order that he should be detained in prison until he should give bail for 3000*l.*, or until further order. A rule was obtained to rescind this order of the Judge.

for detaining a party already in custody, till he finds bail, must be absolute, and not until further orders.

The Court held it illegal, the Judge having no right to make his own or another Judge's order a condition of the discharge. The order should have been to detain until the defendant should be lawfully discharged.

## II. OF THE CAUSE OF ACTION FOR WHICH A PARTY MAY OR MAY NOT BE ARRESTED.

(*a*) In general*.

(*b*) Sum requisite to authorize an arrest†. See also ante, Div. I.

(*c*) On debts contracted abroad and in Scotland‡.

(*d*) Effect of arresting for too large an amount under the 43 Geo. 3, c. 46 §. See the Statute, 2 Peters. Ab. 284, n.

* The power of arresting a party is, in general, limited to a claim of debt for a specific sum, or ascertained damages, and is not allowed for costs or damages independent of contract. It is allowed for the arrears of an annuity. (*Anderson* v. *Bell*, 2 C. & J. 630; S. C. 2 Tyrw. 732). But a defendant cannot be arrested for double value under the 11 Geo. 2, c. 19, s. 3, incurred by removing goods to avoid a distress. (*Sutton* v. *Oswald*, E. T. 1832, B. C., 1 D. P. C. 348).

† A reduction of the debt after the affidavit to hold to bail and before writ issued, below the amount which authorizes an arrest, renders a subsequent arrest void. (*Short* v. *Cunningham*, H. T. 1833, Ex., 1 D. P. C. 662).

‡ On a contract made in a foreign country where no arrest was allowed by the foreign law:—Held, that the remedy was to be according to the law where the parties resided; and as the plaintiff resided in England, an arrest was legal. (*De la Vega* v. *Vianna*, T. T. 1830, K. B., 1 B. & Ad. 284). But the Court will not interfere where proceedings have been taken in a foreign country, unless it appear that the plaintiff had the same remedy in that country. (*Naylor* v. *Eagar*, H. T. 1828, Ex., 2 Y. & J. 90). Though, where a party was liable to arrest in Scotland for *fee-farm* rent, issuing out of lands there:—Held, that he could not be arrested in England in respect of such claim. (*Mackenzie* v. *Johnson*, 1 Scott, 594).

§ The 43 Geo. 3 only applies to cases where a verdict has been recovered, (*Weaver* v. *Birdsall*, E. T. 1824, Ex., 12 Price, 734), and not to a cause removed from the Palace Court. (*Connel* v. *Watson*, E. T. 1833, K. B., 2 D. P. C. 139—S. P. *James* v. *Dawson*, 1 D. P. C. 341). But there must be an arrest, (*Wilson* v. *Broughton*, E. T. 1832, Ex., 2 D. P. C. 63), in fact; (*James* v. *Askew*, T. T. 1838, K. B., 8 Ad. & E. 351); and holding to bail; putting in bail without an arrest; (*Bates* v. *Pilling*, H. T. 1834, Ex., 2 D. P. C. 367; S. C. 2 C. & M. 374); unless he be detained until he executes a bail-bond, (*Reynolds* v. *Matthews*, H. T. 1839, B. C., 7 D. P. C. 580), or an undertaking being given and then a discharge on a common appearance, on the ground of a defective affidavit, is not within the statute. (*Amor* v. *Blofield*, T. T. 1832, 9 Bing. 91; S. C. 1 D. P. C. 277; S. C. 2 M. & Sc. 156). However, malice need not be proved, the want of reasonable or probable cause being sufficient. (*Donlan* v. *Brett*, M. T. 1829, K. B., 10 B. & C. 117). But the proof of want of probable cause lies on the defendant; (*Nicholas* v. *Hayter*, M. T. 1834, K. B., 2 Ad. & E. 348; S. C. 4 N. & M. 882—S. P. *White* v. *Prickett*, H. T. 1838, C. P., 6 D. P. C. 445—S. P. *Twiss* v. *Osborne*, 3 D. P. C. 107; 2 Ad. & E. 34); however, it is sufficient if he establishes a primâ facie case; (Ibid.); as, where an arrest was made before the credit expired; (*Day* v. *Puton*, M. T. 1829, K. B., 10 B. & C. 120); or where the party at the time has little or no knowledge of the amount of the debt; (*Griffiths* v. *Pointon*, M. T. 1833, K. B., 2 N. & M. 675); or where the sum recovered bears no proportion to the amount of the arrest, unless rebutted by the plaintiff. (*Summers* v. *Grosvenor*, M. T. 1833, Ex., 2 D. P. C. 224; S. C. 2 C. & M. 341). So, where defendant was arrested for goods sold, for the greater part of which he had given his acceptances:—Held, that such arrest was without reasonable or probable cause, and defendant entitled to his costs under the 43 Geo. 3. (*Heywood* v. *Flower*, 3 M. & Scott, 801).

So, if the plaintiff arrests a defendant for one side of a mutual account, without giving credit for what he knows to be due from himself, although the defendant has refused to deliver his account, the latter is entitled to his costs under the 43 Geo. 3, c. 46, s. 3. (*Ashton* v. *Naull*, M. T. 1834, C. P., 2 D. P. C. 727).

So, in *Linley* v. *Bates*, (T. T. 1832, Ex., 2 C. & J. 659), where a defendant was arrested for 37*l.*, the amount of goods sold and delivered. The defence was, that the goods were of bad quality and had been returned to the plaintiff, who sent them back. The plaintiff recovered 15*l.* only; and upon an affidavit, uncontradicted, that the defendant had objected to the quality of the goods and the plaintiff had agreed to take them back:—Held, that the defendant was entitled to costs under the statute 43 Geo. 3, c. 46, s. 3, the arrest being without reasonable or probable cause.

So, where goods are sold with a warranty, and the warranty is found to be false, the purchaser cannot therefore rescind the contract by endeavouring to return the goods, unless the defendant agrees to take them back, or unless an express right to rescind is reserved at the time; and consequently, where a horse was sold warranted sound, and the horse proved to be unsound, but the seller refused to take back the horse, it was held, that the purchaser could not bring money had and received and arrest for the price, having only a right to sue for damages. The seller having been arrested, and a less sum recovered, it was held to be an arrest without reasonable or probable cause, and that the defendant was entitled to his costs under the 43 Geo. 3, c. 46, s. 3. (*Gompertz* v. *Denton*, M. T. 1832, Ex., 1 D. P. C. 623).

So, a defendant will be entitled to his costs under the 43 Geo. 3, c. 46, s. 3, if he has been arrested for a larger sum than that found to be due, when the plaintiff ought to have known that he had not legal proof in support of his claim to the extent for which the arrest took place. (*Robinson* v. *Whitehead*, H. T. 1838, B. C., 6 D. P. C. 292).

So, where the plaintiff failed in recovering the sum for which he arrested the defendant, the Court allowed the defendant his costs under the 43 Geo. 3, c. 46, though the account was very long and had been running for several years, it appearing that there must have been either gross neglect or wilful overcharges in making out the account. (*Hall* v. *Forget*, H. T. 1833, Ex., 1 D. P. C. 696). Though, where there is a reasonable doubt in law as to the right of the plaintiff to recover part of his demand:—Held, that defendant was not entitled to claim the benefit of the 43 Geo. 3, c. 46. (*Stovin* v. *Taylor*, H. T. 1833, K. B., 1 D. P. C. 697, n). So, where the evidence is contradictory, the defendant is not entitled to costs. (*Shatwell* v. *Barlow*, E. T, 1835, Ex., 3 D. P. C. 709).

And where the defendant tendered 25*l.*, the plaintiff afterwards arrested him for 32*l.*, on reference to arbitration, the former sum was awarded, no money being paid into Court:—Held, that the defendant was not entitled to costs under the 43 Geo. 3, (*Sherwood* v. *Taylor*, M. T. 1827, C. P., 6 Bing. 280; 3 M. & P. 641), as the statute does not apply where a cause is referred to arbitration. (*Keene* v. *Deeble*, M. T. 1824, K. B., 3 B. & C. 491; S. C. 5 D. & R. 383—S. P. *Holden* v. *Raitt*, H. T, 1835, K. B., 2 Ad. & E. 445). So, where an attorney arrested for two sums, as to one of which he had delivered no bill; (*Hamilton* v. *Pitt*, M. T. 1830, C. P., 7 Bing. 230; S. C. 1 D. P. C. 209); or for goods delivered, when part had been returned, which the plaintiff did not know. (*Roper* v. *Shevely*, E. T. 1833, Ex., 2 D. P. C. 14; S. C. 1 C. & M. 496—S. P. *Sutton* v. *Burgess*, M. T. 1835, Ex., 4 D. P. C. 376). So, paying money into Court, which is taken out by the plaintiff, deprives the defendant of his right to costs. (*Rowe* v. *Rhodes*, H. T. 1834, Ex., 2 C. & M. 379; S. C. 2 D. P. C. 384). However, in the case of *Day* v. *Clark*, (M. T. 1838, C. P., 7 D. P. C. 147), the defendant was arrested by the plaintiff, an architect, for 347*l.* 5*s.*, for work and labour, &c. The cause having been referred, the arbitrator awarded the plaintiff a sum of 11*l.*, over and above 200*l.* paid into Court. The plaintiff's claim was founded upon a per centage of 5*l.* chargeable on the sum expended on the building on which he was employed; which was sworn, by various persons to amount to from 2000*l.* to 3000*l.*:—Held, that there was reasonable and probable cause for the arrest; and that the defendant was not entitled to his costs under the 43 Geo. 3, c. 46, s. 3. (S. P. *Brooks* v. *Rigby*, M. T. 1834, K. B., 2 Ad. & E. 21). In deciding on the 43 Geo. 3, the Court will take into consideration the way in which the debt was contracted. (*Erle* v. *Wynne*, E. T. 1833, Ex., 1 C. & M. 532; S. C. 2 D. P. C. 23; S. C. 3 Tyrw. 586). As, where plaintiff arrested defendant for 50*l.* Plea: coverture. Verdict for 38*l.* for money advanced. Since her husband's death, defendant applied for costs under 43 Geo. 3, c. 46, s. 3:—Held, that to obtain her costs, it must be shewn that the plaintiff knew of her coverture at the time of the arrest. (*Spooner* v. *Danks*, T. T. 1831, C. P., 1 D. P. C. 232).

## III. AT WHOSE SUIT ARREST MAY BE MADE*.

## IV. WHO MAY OR MAY NOT BE ARRESTED.

### (*a*) Personal exemption from arrest†.

So, where a defendant was arrested upon a writ in which the sum of 37*l.* was, by mistake, inserted as the sum for which bail was to be taken; but upon the back of the writ the plaintiff demanded 27*l.* only, which was the amount really claimed. The officer was informed of the mistake and desired to arrest for the smaller sum. The defendant was arrested and sent to prison, and the plaintiff, at the trial, made out a claim to the extent of 28*l.*; but there being no count in the declaration to warrant part of the demand, he agreed to forego that part, to prevent further litigation, and take a verdict for 20*l.* only. The Court, under these circumstances, refused to allow the defendant his costs under the 43 Geo. 3, c. 46, s. 3. (*Preedy* v. *Macfarlane*, H. T. 1835, Ex., 3 D. P. C. 458).

So, where two defendants having been arrested for a sum of 45*l.*, the plaintiff, at the trial, recovered only 21*l.* Part of the demand was for a sum of 19*l.* 10*s.*, which, it was stated by a witness, he had been paid on a particular day; and a receipt was put in, from which it appeared that the money was paid on a former day. The jury, under the circumstances, disallowed that part of the plaintiff's demand, and also made a small deduction from the other part. It was not denied, however, by the defendants, that the money was due; and it was positively sworn by the plaintiff that it was due from the defendants:—Held, that the defendants were not entitled to their costs under the 43 Geo. 3, c. 46. (*Smith* v. *Smith*, E. T. 1835, Ex., 3 D. P. C. 733).

So, where the reduction of the plaintiff's claim was occasioned by a dispute as to the right of the defendant to claim a set-off:—Held, that though the arbitrator awarded in favour of the defendant in respect of the set-off, and thereby reduced the plaintiff's claim a third, that the defendant was not entitled to his costs under the 43 Geo. 3, c. 46, s. 3. (*Cawthorne* v. *Cawthorne*, T. T. 1835, Ex., 4 D. P. C. 182).

The holder of a bill, who has given some value for it, is entitled to arrest for the whole amount of the bill, unless he is aware that no consideration passed between the prior parties to that amount; and, therefore, though he recover less than the amount for which he arrested, the defendant is not entitled to costs under the 43 Geo. 3, c. 46. (*Edwards* v. *Jones*, E. T. 1837, Ex., 5 D. P. C. 585).

So, an application being made under the stat. 43 Geo. 3, c. 46, s. 3, by the defendant, for his costs, and it being shewn that he was arrested for a sum of 28*l.*, which was made up of two amounts of 17*l.* claimed on a bill of exchange and 11*l.* for goods sold, and, at the trial, a verdict being returned for the plaintiff for the first-mentioned sum, but the defendant having pleaded the Statute of Limitations, the claim for the second sum was abandoned; but, it appearing, on an affidavit sworn by the plaintiff, that the defendant had frequently admitted the amount for the goods sold to be due:—Held, that the defendant was not entitled to his costs. (*White* v. *Prickett*, H. T. 1838, C. P., 6 D. P. C. 445).

And, where a sheriff's officer, having a warrant against the defendant, went to his house and informed him of it, and agreed with him that they should meet at a certain place and time, and that the defendant should there give bail to the sheriff; which was accordingly done:—Held, that this was not an arrest so as to satisfy the meaning of the statute 43 Geo. 3, c. 46, s. 3. And where, in an action for an attorney's bill, the defendant obtained an order for referring it to taxation, the plaintiff to give the defendant credit for all sums received on his account: on payment of which costs and of the costs of the action, all proceedings to be stayed:—Semble, that the award of the Master under this order was not a recovery of the amount within the meaning of the stat. 43 Geo. 3, c. 46, s. 3. (*Robinson* v. *Powell*, M. T. 1837, Ex., 5 M. & W. 479).

* An indorsee of a bill of exchange may arrest though he has indorsed it over, if the party merely holds it as trustee for such indorsee. (*Stone* v. *Butt*, H. T. 1834, Ex., 2 D. P. C. 335; S. C. 2 C. & M. 416).

† An Irish peer, who has voted in the election of representative peers and whose vote has been allowed by the House of Lords, is privileged from arrest. (*Coates* v. *Hawarden*, M. T. 1827, K. B., 7 B. & C. 388; S. C. 1 M. & R. 110). So, a defendant, who on three occasions voted in the character of a Scotch peer, is privileged from arrest. (*Digby* v. *Stirling*, M. T. 1831, C. P., 8 Bing. 55; S. C. 1 D. P. C. 248; S. C., M. & Sc. 116). A chaplain to the King is privileged from

### (*b*) Temporary exemptions*.

### (*c*) Local exemptions†.

## V. OF ARREST—AFTER SERVING DEFENDANT WITH PROCESS‡.

## VI. SECOND ARREST FOR THE SAME CAUSE OF ACTION.

### (*a*) General rule§.

arrest. (*Byrn* v. *Dibdin*, H. T. 1835, Ex., 1 C., M., & R. 821; S. C. 5 Tyrw. 357; S. C. 3 D. P. C. 448). So is a lord of the bedchamber. (*Park*, J., at chambers, 1835.—*Aldridge* v. *Lord Tullamore*, 3 D. P. C. 450, n.). And the privilege from arrest applies to a page of the second class in ordinary to the Queen; (*Reynolds* v. *Pocock*, M. T. 1838, Ex., 4 M. & W. 371; S. C. 7 D. P. C. 4); and to the candle and fire lighter to the yeomen of the guard. (*Hatton* v. *Hopkins*, K. B., 6 M. & Selw. 271). But, on motion, the Court refused to discharge out of custody "the Somerset Herald," leaving him to his writ of Privilege. (*Leslie* v. *Disney*, H. T. 1834, Ex., 1 C., M., & R. 578; 5 Tyrw. 181; S. C. 3 D. P. C. 437). A clergyman on his way to the altar is privileged from arrest. (*Goddard* v. *Harris*, H. T. 1831, C. P., 7 Bing. 320; 5 M. & P. 122).

* The privilege from arrest applies to a petitioning creditor, eundo, morando, et redeundo, whilst attending the Commissioners of Bankrupts, (*Selby* v. *Hills*, H. T. 1832, 8 Bing. 166; S. C. 1 M. & Sc. 253; S. C. 1 D. P. C. 257). And, to a suitor redeundo from Court, notwithstanding a slight deviation, (*Pitt* v. *Coombs*, H. T. 1834, K. B., 3 N. & M. 212). As, where a party to a cause on returning from Court to his residence, stopped at his office to take refreshment, where he was arrested; but the Court discharged him, his privilege continuing, (*Pitt* v. *Coombs*, 4 N. & M. 535; S. C. 5 B. & Ad. 1078). So, a witness voluntarily attending a trial, which was referred to arbitration, is privileged from arrest on his return home, (*Alderson*, J.—*Rishton* v. *Nisbett*, Sp. Ap. 1834, N. P., 1 M. & Rob. 347). So, a subpœnaed witness, on a criminal trial, who is committed for a contempt, on being discharged from his imprisonment, has the same privilege from arrest in returning home after the imprisonment as he would have had in returning home after trial. (*Rex* v. *Wigley*, 7 C. & P. 4). But the privilege from arrest does not extend to a party attending an arbitrator, who stayed to await the event of an application to the Court, in consequence of a revocation of the submission, and his want of pecuniary means of returning. (*Spencer* v. *Newton*, E. T. 1837, K. B., 5 A. & E. 623; S. C. 1 N. & P. 818).

Upon a charge of forgery, and without warrant, a defendant was arrested on Sunday. On being discharged by the magistrate, when leaving the police office, he was arrested upon civil process:—Held, he was not privileged from arrest, (*Jacobs* v. *Jacobs*, E. T. 1835, Ex., 3 D. P. C. 675). And the same rule holds where the defendant is returning home from jail after having been tried and acquitted. (*Goodwyn* v. *Lordon*, E. T. 1834, K. B., 1 A. & E. 378; S. C. 3 N. & M. 879; S. C. 2 D. P. C. 504—S. P. Anon. H. T. 1832, B. C., 1 D. P. C. 157). Aliter, where returning from the Chambers of a Judge, who has discharged him on habeas corpus. (*Rex* v. *Blake*, M. T. 1833, K. B., 4 B. & Ad. 355; S. C. 2 N. & M. 312). And the Court only granted a rule nisi where the defendant was arrested on his way to Court to deliver himself up to receive judgment on a conviction for a conspiracy. (*Sharplin* v. *Hunter*, E. T. 1838, C. P., 6 D. P. C. 632).

† Though an arrest within the precincts of the Tower is irregular, yet the party entitled to complain is only he whose franchise has been invaded, (*Bell* v. *Jacobs*, H. T. 1828, C. P., 4 Bing. 523; S. C. 1 M. & P. 309).

‡ Where a plaintiff sued out serviceable process, and an order for particulars was made, and two terms after suing out the serviceable process, he arrested the defendant:—Held, that the arrest was regular, although the order for particulars operated as a stay of proceedings in the first action. (Anon. E. T. 1831, K. B., 1 D. P. C. 59).

§ The rule prohibiting second arrest for the same cause of action only applies to where the plaintiff is in fault, and not the defendant, as, where defendant was discharged on the terms of his giving security, which he never gave. (*Cantellow* v. *Trueman*, E. T. 1833, Ex., 2 D. P. C. 2; S. C. 1 C. & M. 536; S. C. 3 Tyrw. 579). But where the plaintiff is in fault, as where he arrests for two demands, one he recovers, the other he does not, for want of a formality; he cannot arrest

(*b*) After prior arrest in a foreign country, and Ireland*.

(*c*) On new security for same cause of action†.

(*d*) Where time has been given without new security‡.

(*e*) After discontinuance of former suit§.

(*f*) Where made by a different party on the same security‖.

(*g*) After death of plaintiff by his representative¶.

(*h*) Where made after a criminal arrest for the same cause**.

## VII. CONSEQUENCES OF ARRESTING PRIVILEGED PERSONS††.

again for the latter. (*Hamilton* v. *Pitt*, M. T. 1830, C. P., 7 Bing. 231; S. C. 1 D. P. C. 209; S. C. 4 M. & P. 868).

The want of a Judge's order to authorize a second arrest for the same cause cannot be objected to, where an undertaking to put in bail has been given. (*Holliday* v. *Lawes*, H. T. 1837. C. P., 3 Bing. N. S. 541; S. C. 4 Scott, 354; S. C. 5 D. P. C. 485).

* Upon a judgment obtained in a foreign country, founded upon an arrest, it was holden, defendant might be arrested in England on that judgment. (*Aliven* v. *Furnival*, M. T. 1832, Ex., 1 D. P. C. 614). But, where a defendant had been arrested in Ireland, on a bill of Exchange, but discharged on common bail, the affidavit being defective, in an action on the judgment obtained in Ireland:—Held, the defendant could not be arrested again in England. (*Gunn* v. *M'Clintock*, E. T. 1834, Ex., 2 D. P. C. 660; S. C. 2 C. & M. 668; S. C. 4 Tyrw. 988).

† An arrest on new securities cannot be made in the absence of fraud. (*Wilson* v. *Hamer*, M. T. 1831, C. P., 8 Bing. 54; S. C. 1 M. & Sc. 120; S. C. 1 D. P. C. 248—*Semble* contra *Puckfold* v. *Maxwell*, 6 Ter. Rep. 52; Abridg. 2 Peters. Ab. 315). But, where a defendant was arrested, to obtain his discharge gave a bill of exchange on a third party, the plaintiff discontinued that action; the bill not being paid when due:—Held, that a second arrest on the bill was good. (*Hamber* v. *Cooper*, E. T. 1835, Ex., 2 C., M. & R. 148; S. C. 3 D. P. C. 671).

‡ Where, upon a bailable writ, an undertaking was given, and it was agreed no proceedings should be taken without three months' notice:—Held, that after three months' notice, and sixteen months having elapsed, a second bailable writ might issue. (*Ryves* v. *Bunning*, E. T. 1835, Ex., 3 D. P. C. 817).

§ Where a writ is issued, which is the only step taken, a discontinuance of the writ is a discontinuance of the cause. (*Richards* v. *Stuart*, M. T. 1833, C. P., 2 D. P. C. 754). Discontinuing an action commenced by serviceable process, at any time before trial, is sufficient for the purpose of arresting a defendant. (*Williams*, J.—*Brickline* v. *Smallwood*, E. T. 1835, B. C., 3 D. P. C. 569). And, it seems there may be an arrest without discontinuance, after serviceable writs only. (*Littledale*, J.—*Chapman* v. *Vandevelde*, H. T. 1835, B. C., 3 D. P. C. 313).

*Aliter, as to bailable process.*—A party was arrested, and his attorney having pointed out an irregularity in the process, the plaintiff discontinued the action, taxed the defendant's costs, and paid them, and then sued out a fresh writ, and arrested the defendant thereon:—Held, that it was not necessary to give the sheriff notice of the discontinuance, although he had taken an undertaking for a bailbond on the first arrest, and claimed to detain the defendant thereon, the latter not having sustained any damages. (*Price* v. *Day*, H. T. 1835, Ex., 5 Tyrw. 456; S. C. 3 D. P. C. 463).

‖ An arrest made by a different party on the same security cannot be sustained. (*M'Clure* v. *Pringle*, H. T. 1824, Ex., 13 Price, 8; S. C. M'Clel. 1).

¶ An arrest by a testator does not preclude his executors arresting for the same cause of action. (*Mellin* v. *Evans*, T. T. 1830, Ex., 1 C. & J. 82).

** The rule as to second arrest does not apply where the first arrest was on criminal process wholly unfounded, or on process wholly irregular. (*Mackie* v. *Warren*, M. T. 1828, C. P., 5 Bing. 176; S. C. 2 M. & P. 279).

†† To grant or refuse relief to a privileged person arrested, is discretionary with the Court. (*Bidgood* v. *Davies*, M. T. 1826, K. B., 6 B. & C. 84; S. C. 9 D. & R.

## VIII. OF THE DISCHARGE FROM.

### (*a*) In general*.—See also tit. *Bail.*

### (*b*) Under 1 Vict. c. 110.

A defendant arrested under 1 Vict. may apply for his discharge to a Judge, or the Court.

By 1 Vict. c. 110, s. 6, it is enacted, "That it shall be lawful for any person arrested upon any writ of capias, to apply, at any time after such arrest, to a Judge of one of the superior Courts at Westminster, or to the Court in which the action shall have been commenced, for an order, or rule, on the plaintiff in such action, to show cause why the person arrested should not be discharged out of

153). And should be made before any step taken. Hence, a witness arrested, by giving bail, waives his right to apply for his discharge. (*Lyne, Ex parte*, 3 Stark, 132). If a privileged person be arrested as a witness, he must apply to the Judge at Nisi Prius, or the Court out of which the process issued. (*Pitt* v. *Evans*, M. T. 1833, Ex., 2 D. P. C. 223).

Where a defendant was arrested under an attachment out of the Court of Chancery for non-payment of costs, and a capias utlagatum out of this Court, at the suit of the same party, who was the plaintiff in the equity suit, was on the same day lodged with the sheriff, and the arrest under the attachment was afterwards set aside by the Court of Chancery for irregularity:—Held, that the defendant was entitled to be discharged as to the capias utlagatum also. (*Hall* v. *Hawkins*, H. T. 1839, Ex., 4 M. & W. 590). But, where a party privileged from arrest redeundo, was arrested on a writ of capias ad respondendum, and applied for and obtained a Judge's order for his discharge in that action, on the ground of his privilege. At the time of his arrest other writs of ca. sa. against him were in the hands of the sheriff:—Held, that the sheriff was justified in detaining him on those writs, notwithstanding notice of the Judge's order. (*Watson* v. *Carroll*, H. T. 1839, Ex., 4 M. & W. 592).

* To induce the Court to discharge defendant out of custody upon the merits; (*Mason* v. *Smith*, T. T. 1836., Ex., 5 D. P. C. 179); or, on an affidavit that the plaintiff has no cause of action; (*Burton* v. *Haworth*, H. T. 1833, K. B., 4 B. & Ad. 462; S. C. 1 N. & M. 318); or abuse of the process of the Court must be shewn. (*Tucker* v. *Tucker*, E. T. 1833, C. P., 1 Scott, 463). It is no ground for discharging a defendant out of custody because the plaintiff's particulars shew that the debt is barred by the statute of limitations. (*Merceron* v. *Merceron*, M. T. 1836, K. B., 5 D. P. C. 271). Or, that an arrest was against good faith, plaintiff having engaged to receive the debt by instalments. (*Udall* v. *Nelson*, E. T. 1835, K. B., 2 A. & E. 215; S. C. 4 N. & M. 637). But, a motion to discharge a defendant out of custody will be granted, if the debt and costs be paid, no matter by whom they were paid. (*Williams*, J.—*Rimmer* v. *Turner*, E. T. 1835, B. C., 3 D. P. C. 601); or, if defendant will pay into Court the sum claimed, and expenses. (*Pitt* v. *Coombs*, H. T. 1835, K. B., 2 A. & E. 459; S. C. 4 N. & M. 535). Trifling defects in a writ of capias no ground for discharging the defendant out of custody. (*Pocock* v. *Mason*, H. T. 1833, C. P., 1 Scott, 51). And, an application to discharge a defendant out of custody, on the ground of a defect in process, should be made within the time for putting in bail. (*Brashour* v. *Russell*, M. T. 1837, C. P., 4 Bing. N. S. 31; S. C. 5 Scott, 268). And, it seems that a mistake of the sheriff in making an incorrect copy makes no difference. (Ibid). At all events, any irregularity in the mode of arrest cannot be taken advantage of after plaintiff has declared, judgment signed, and defendant charged in execution. (*Patteson*, J. —*Cross* v. *Marsh*, H. T. 1838, B. C., 6 D. P. C. 280). And, where the arrest was made on the 3rd February, held, that an application to discharge the defendant out of custody on the 18th of April following, was too late. (*Regina* v. *Burgess*, E. T. 1838, Q. B., 8 A. & E. 275). The Court will not summarily discharge out of custody a foreigner arrested for the residue of a debt, from which he had been discharged in his own country upon proceedings analogous to the English bankrupt laws. (*Bretillot* v. *Sandos*, E. T. 1837, C. P., 4 Scott, 201). And the Court will not discharge a defendant out of custody on the ground that the debt for which he has been arrested is founded on an illegal consideration, and an injunction has issued from the Court of Chancery to stay proceedings at law. If, however, the process of the Court has been abused for the purpose of oppression the Court will interfere. *Curzon* v. *Hodges*, E. T. 1836, Ex., 5 D. P. C. 98).

custody; and that it shall be lawful for such Judge or Court to make absolute, or discharge such order, or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein, as to such Judge or Court shall seem fit; provided that any such order made by a Judge may be discharged, or varied by the Court, on application made thereto, by either party dissatisfied with such order.

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So may prisoners in custody at the time of the passing of the act.

By sect. 7, it is enacted, "That every prisoner, who, at the time appointed for the commencement of this act, shall be in custody upon mesne process, for any debt or demand, and shall not have filed a petition to be discharged, under the laws now in force for the relief of insolvent debtors, shall be entitled to his discharge upon entering a common appearance to the action; provided, nevertheless, that every such prisoner shall be liable to be detained, or after such discharge, to be again arrested, by virtue of any such special order, as aforesaid, at the suit of the plaintiff, at whose suit he was previously arrested, or of any other plaintiff."

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Hopkins, *v.* Salembier, T. T. 1839. Ex. 5 *M. & W.* 423; S. C. 7 *D. P. C.* 493, *by name of* Hopkinson *v.* Salembier.

Where the affidavit is insufficient to support the arrest, the motion should be to set aside the Judge's order, not the capias.

The affidavit to found the arrest, under the 1 & 2 Vict. c. 110, was to the effect that the defendant had said that he would not pay the bill, and that rather than do so he would go and travel in Scotland or Ireland. The defendant having given bail, obtained a rule to show cause why the capias should not be set aside.

*Sed per Cur.*—The application should be to set aside the Judge's order. If we were to set aside the capias we should make the sheriff a trespasser.

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Sugars *v.* Concanen, E. T. 1839. Ex. 5 *M. & W.* 30.

And it should be promptly made, at least within the time for putting in bail.

A writ of capias was issued, by order of *Coltman*, J., under sect. 3rd of 1 & 2 Vict. c. 110, and the writ itself was regular, and in conformity with the act, and the memorandum, which was subscribed to it, required that it should be executed within one calendar month from its date. The copy served upon the defendant stated that it was to be executed within four calendar months. This was the irregularity complained of. It further appeared that the arrest was on the 28th of March, but that this application was not made till the 17th of April.

*Per Cur.*—This application is too late, as the arrest was upon the 28th of March, and it does not appear that any motion was made till the 17th of April. This step should have been taken within four days, but here twenty days have intervened.

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Nyas *v.* Milton, M. T. 1838. Ex. 4 *M. & W.* 359.

But the statute does not apply to an arrest on an escape warrant.

A defendant had been arrested before the 1 & 2 Vict. c. 110, came into operation, and escaped; and being retaken on an escape warrant after the 1 & 2 Vict. came into force, motion was made to discharge the defendant out of custody, under 1 Vict. c. 110.

*Sed per Cur.*—This case is not within the statute, which contemplates arrests made at the commencement of the action, and not an arrest on an escape warrant.

## IX. OF THE ARREST.

### (*a*) Of the 1 & 2 Vict. c. 110.

The sheriff may arrest within one month after the date of the capias, and detain till defendant finds bail, or makes deposit.

By 1 & 2 Vict. c. 110, sect. 4, it is enacted, "That the sheriff, or other officer, to whom any such writ of capias shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant, when so arrested, shall remain in custody until he shall have given a bailbond to the sheriff, or shall have made deposit of the sum indorsed on such writ of capias, together with ten pounds for costs, according to the present practice of the said superior Courts; and all subsequent proceedings as to the putting in and perfecting special bail, shall be according to the like practice of the said superior Courts, or as near thereto as the circumstances of the case will admit."

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### (*b*) Of the warrant*.

### (*c*) Of the manner and place of the arrest†.

On the arrest, a copy of the writ must be deli-

By 2 Will. 4, c. 39, s. 4, it is enacted, "That in all actions, wherein it shall be intended to arrest and hold any person to special bail, who may not be in the custody of the marshal of the Marshal-

* A sheriff's officer cannot justify an arrest made, without a warrant, by procuring a warrant previously issued to another sheriff's officer, but not executed, to be delivered to himself, with his name inserted after the arrest. (*Collins* v. *Yewens*, T. T. 1839, K. B., 2 P. & D. 439—S. P. *Richards* v. *Yewens*, T. T. 1839, K. B., 2 P. & D. 444). An arrest by an officer without his warrant or the writ in his possession, though a ground for discharging the defendant out of custody, yet the defendant may be taken again on the same writ. (*Plomer* v. *Ball*, M. T. 1837, K. B., 5 A. & E. 823). A sheriff's warrant to his bailiff to take, and the jailer to detain, until bail be put in, &c., omitted to state the Court out of which the writ issued:—Held sufficient. (*Ashby* v. *Goodyer*, T. T. 1835, Ex., 4 Tyrw. 414). But, the warrant of the Chancellor of Oxford for arresting a party, does not extend to a defendant not resident at the time of the commencement of the suit within the precinct of the University:—Held, that the arrest under such circumstances was bad. (*Perrin* v. *West*, T. T. 1835, K. B., 3 A. & E. 405; S. C. 5 N. & M. 291).

S., a sheriff's officer, arrested the defendant, not then having any warrant, and took him to a lock-up house. At that time there was a warrant in the sheriff's office, directed to another officer, to arrest the defendant at the suit of the plaintiff. S. went to the sheriff's office, and representing that he had an opportunity of arresting the defendant, got his own name inserted in that warrant. It appeared that this was in accordance with the practice of the office, and it was sworn that the sheriff was ignorant that the defendant had at that time been already arrested. S. took the warrant and arrested the defendant, at the suit of the plaintiff:—Held, that the defendant was not entitled to be discharged. (*Robinson* v. *Yewens*, E. T. 1839, Ex., 5 M. & W. 149).

† Mere words do not constitute an arrest, although the party say, "I will come to you immediately." (*Russen* v. *Lucas*, H. T. 1824, N. P., 1 R. & M. 26; S. C. 1 C. & P. 153). But, if the party be touched, it is an arrest. (*Nicholl* v. *Darley*. T. T. 1828, Ex., 2 Y. & J. 399). So, placing a party under restraint of a sheriff's officer, who shews the capias, is an arrest. (*Grainger* v. *Hill*, H. T. 1838, C. P., 4 Bing. N. S. 212; S. C. 5 Scott, 561). And, to constitute an arrest there need be no corporal touching: but, where the warrant was not shewn to the defendant, or mentioned, or the defendant informed that he was in custody, though closely watched:—Held, no arrest. (*Williams*, J.—*Robins* v. *Hender*, E. T. 1835, 3 D. P. C. 543). A sheriff's officer having a warrant from the sheriff to arrest a party for debt, went

sea of the Court of King's Bench, or of the warden of the Fleet prison, the process shall be by writ of capias, according to the form contained in the said schedule; and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or several therewith, shall be delivered therewith to the sheriff, or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed, by him, whether by service or arrest, and shall indorse on such writ the true day of the execution thereof, whether by service or arrest.

vered to the defendant*.

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### (*d*) Sheriff and his officers' duty after†.

Barsham *v.* Bullock, E. T. 1839. Q. B. 10 *A. & E.* 23; S. C. 2 *P. & D.* 241.

In debt for a penalty, under 32 Geo. 2, c. 28, against defendant for taking the plaintiff, who had been arrested by the defendant, to a public drinking house, without the plaintiff's consent. The plea traversed the taking the plaintiff to the drinking house without his consent. Evidence was given at the trial that the same officer of the defendant who arrested the plaintiff, also took him to the drinking house against his consent:—

Held, that, as the plea admitted the officer who arrested was the

On suing for penalties, under 32 Geo. 2, c. 28, it is not necessary to produce the warrant to the bailiff, when the arrest is admitted by the plea, and the

to the party, and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney to let him know, for bail to be put in. After this, the officer returned that he had taken the party:—Semble, that this is no arrest. (Lord *Tenterden*, C. J.—*George* v. *Radford*, M. T. 1828, N. P., 3 C. & P. 464). So, if a sheriff's officer send his servant to a party to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and execute a bailbond, this is not an arrest. (*Abbot*, C. J. —*Berry* v. *Adamson*, M. T. 1826, N. P., 2 C. & P. 503). To make an arrest, the outer-door cannot be broken open; if it be, the defendant will be discharged out of custody. (*Patteson*, J.—*Hodgson* v. *Towning*, H. T. 1836, B. C., 5 D. P. C. 410). An objection, that the defendant was arrested in one county, and taken into another county, and detained there two days, cannot be taken twenty-three days after the arrest. (*Fownes* v. *Stokes*, T. T. 1835, C. P., 2 Scott, 205; S. C. 4 D. P. C. 125). A defendant may be arrested whilst in jail if there for his own purposes. (*Littledale*, J.—*Loveitt* v. *Hill*, H. T. 1836, B. C., 4 D. P. C. 579). But the place of arrest cannot be proved by a note made by the sheriff's officer and transmitted with the writ to the sheriff's office, though the officer be dead. (*Chambers* v. *Bernasconi*, T. T. 1834, Ex. Chamb., 4 Tyrw. 531; 1 C., M. & R. 347).

* The copy of the writ delivered should have no word written varying from the original in sense or sound, as 'Middesex' for 'Middlesex.' (*Hodgkinson* v. *Hodgkinson*, T. T. 1834, K. B., 1 A. & E. 533; S. C. 3 N. & M. 564; S. C. 2 D. P. C. 535); and must contain the date. (*Smart* v. *Johnson*, M. T. 1837, Ex., 6 D. P. C. 90); and the plaintiff's name; if it does not the defendant will be discharged out of custody. (*Coleridge*, J.—*Hodd* v. *Langridge*, T. T. 1837, B. C., 5 D. P. C. 721).

† Under the 32 Geo. 2, (2 Peters. Ab. 383, n.), c. 28, which prohibits taking a party to jail within twenty-four hours after arrest, the officer should require the party to nominate some convenient place to be taken to. (*Simpson* v *Renton*, T. T. 1833, K B., 5 B. & Ad. 35; S. C. 2 N. & M. 52). In *Silk* v. *Humphrey* and *Another*, 4 A. & E. 959; S. C. 7 C. & P. 14). In debt for a penalty, under the statute against the sheriff, for carrying the plaintiff to prison within twenty-four hours, plea, that it was with his consent, on which issue was joined:—Held, on motion for judgment, non obstante veredicto, a good plea, the circumstances being equivalent to a refusal:—Held also, issue being joined on the allegation of the consent to go to L.'s house, that the consent to be proved was not such consent as a person would give who had the option of being at large; but that the question

evidence shews the illegal act was done by the same party who arrested.

defendant's agent, and the evidence showed that the same officer took the plaintiff to the drinking house, it was not necessary to produce the warrant to make the defendant liable.

## X. IN INFERIOR COURTS*. See also ante, Div. I.

### Brown *v.* M'Millan, M. T. 1840. Ex. 8 *D. P. C.* 852.

The 1 & 2 Vict. c. 110, has in effect repealed the 7 & 8 Geo. 4, which prohibited an arrest within counties palatine, unless the sum amounted to 50*l.*

An action had been commenced for 22*l.*, in the county palatine of Lancaster. During the progress of the suit a Judge made an order for arrest, under 1 & 2 Vict., c. 110, directed to the Chancellor. But the sheriff refused to execute the writ, because, under the 7 & 8 Geo. 4, c. 71, s. 7, there could be no arrest within a county palatine, unless the sum amounted to 50*l.* On application by the sheriff to set aside the Judge's order, he being ruled to return the writ, and the defendant in the meantime having gone abroad.

*Per Cur.*—A restriction on the operation of writs of mesne process issuing from the Courts at Westminster into counties palatine, was imposed by 7 & 8 Geo. 4, c. 71, which enacts, "That a party shall not be held to bail for a less sum than 50*l.*" Then comes the 1 & 2 Vict., c. 110, abolishing arrest on mesne process issuing from the supreme Courts, except in certain cases; therefore, the effect of the 1st section would be to repeal the 7 & 8 Geo. 4, absolutely, so as to exclude arrest in counties palatine altogether. But the 3rd section relieves us from that conclusion, because it gives a right to arrest in certain cases, and provides a new writ. That section is general, and contains no restriction as to counties palatine. We are therefore of opinion that the order to arrest was properly granted.

### Rogers *v.* Jones, T. T. 1827. K. B. 7 *B. & C.* 86.

Before 1 & 2 Vict. c. 110, the officer of an inferior Court to authorize an arrest, must have been appointed to issue process, and not merely to take affidavits.

By the 12 Geo. 1, c. 29, s. 2, it is provided, "That before arrest by an inferior Court, an affidavit of debt shall be made before the officer who issues the process, or his deputy." In this case P., the deputy, was appointed for taking affidavits only, and not for issuing process.

*Per Cur.*—That statute says that the affidavit must be sworn before the officer who shall issue the process, or his deputy. It is not necessary to say whether that requires the deputy to be appointed generally for the officer, but at all events it makes it necessary that he should be deputy for the purpose of issuing process, and the only authority delegated to P. was that of taking affidavits, consequently the arrest was not good.

was, whether plaintiff consented to go to the particular house, as a person would consent who was obliged to be in confinement somewhere :—Held, also, that the fact of the sheriff suggesting L.'s house did not prevent the consent from being free within the meaning of the issue.

The sheriff is entitled to exercise a reasonable discretion in determining whether a house nominated by a prisoner under arrest, as a safe and convenient dwelling-house be a safe place for the custody of the prisoner. If a person request to be taken to a house for the purpose only of consulting a person there, that is not a nomination of a house within the statute. (*Dewhirst* v. *Pearson*, H. T. 1833, Ex., 1 C. & M. 365). If a defendant, on being arrested, does not name any safe and convenient dwelling-house within the county, in which he is arrested, he may be taken immediately to jail, notwithstanding the 32 Geo. 2, c. 28, s. 2. (*Pitt* v. *Sheriff of Middlesex*, M. T. 1830. C. P., 1 D. P. C. 200).

# Arrest, in Criminal Cases.

BECKWITH *v.* SPICER, E. T. 1827. K. B. 6 *B. & C.* 635; S. C. 3 *N. & M.* 316—S. P. REX *v.* HUNT, Lent Assizes, 1825. 1 *R. & M. C. C.* 95.

A constable without warrant, and where no felony has been charged or committed, has authority to apprehend and detain a party where suspicion exists*.

THIS was an action for false imprisonment. It appeared, that at dark in the evening the plaintiff was observed sitting on the bridge of ————, by a person who happened to be passing, and who, thinking there was some cause for suspicion, went to the defendant and desired him to "look well after" the plaintiff. Defendant went to the plaintiff, and told him that he was come to take him into custody. The plaintiff said he would not be taken, offered to strike defendant, and desired him to show his authority. Defendant said he was the high constable, and called for assistance, when the plaintiff said he would not be collared by any two men, threatened to knock any one down who should collar him, and attempted to go away. He refused to give his name, and resisted being searched. The defendant, however, being assisted by other persons, having succeeded in searching him, found in his pockets some sovereigns, and some oats and beans. The plaintiff, speaking of the oats and beans, said, "they are good ones, they will run after them." There was also a saddle lying at his feet, and he took a bridle out of his pocket, and a spur, and said "this will do to touch them upon the road." The jury found for the defendants. On motion for a new trial—

*Per Cur.*—The question here was, whether there was reasonable cause to suspect that a felony had been committed, or that there was an intent to commit a felony. That was a question solely for the jury, but whether a constable or police officer may apprehend a person under such circumstances as appeared in this case, is a question of law. A private individual, indeed, cannot justify such a detention, unless a felony has been committed. Here

* A man may be arrested without warrant, under 3 Geo. 4. c. 40, s. 5, as a person found in a dwelling-house, &c. with intent to commit a felony, if he is seen in the dwelling-house but gets out of it, and is taken on fresh pursuit. And it makes no difference that he was not seen getting out of the house and was found concealing himself to avoid being apprehended upon other premises near. To make such an arrest legal it is not necessary that the person should have, at the time he is arrested, a continuing purpose to commit the felony, he may be arrested, though that purpose is wholly ended. Where the circumstances are such that a man must know why a person is about to apprehend him, he need not be told, and the arrest will be legal, and the resistance illegal, as much as if he had been told. (*Littledale*, J.—*Rex* v. *Howorth*, Sp. Ap. 1828, N. P., M. C. C. 207).

So, if a man be found attempting to commit a felony in the night, any one may apprehend and detain him, until he can be carried before a magistrate. (*Rex* v. *Hunt*, Lent Ass., 1825, N. P., M. C. C. 93). But, if a constable take a man without warrant upon a charge, which gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only, because a blow, whilst he was under the influence of the provocation from the illegal arrest caused by such man, would not justify the constable in detaining him; at least it will make no difference if the blow was not likely to be followed with dangerous consequences, nor made a new and distinct ground of detainer. (*Rex* v. *Curran*, Sp. Ap. 1826, N. P., M. C. C. 132). And, attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest, and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow. (*Rex* v. *Thompson*, Sum. Ass., 1825, N. P., M. C. C. 80).

the plaintiff had all the materials to lead to the suspicion that he came to decoy and to steal a horse. He had a bridle, a saddle, and a spur, to ride that horse away; and when questioned, and taken into custody, he refused to give his name, and resisted the constable. We cannot say, therefore, that the verdict was wrong.

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WRIGHT *v.* COURT, M. T. 1825. K. B. 4 *B. & C.* 596; S. C. 6 *D. & R.* 623.

But, not in keeping the offender three days before taking him before a magistrate, or putting on handcuffs, unless he endeavours to escape.

FELONIES having been committed in the neighbourhood, defendant, a constable, and others, were placed to watch. The plaintiff, in the night, between the hours of twelve and three, was seen coming out of the house. They apprehended him and took him to a dungeon. Three days afterwards the constable handcuffed him, and took him before a magistrate, who remanded to another time for examination, when he was discharged. To an action for false imprisonment, and handcuffing him, the constable and his assistants pleaded, that they imprisoned him for those three days in order to give time to the prosecutor to obtain the necessary evidence, as the same was a reasonable time for taking him before a magistrate. No excuse was given for putting on the handcuffs.

*Per Cur.*—It is impossible to contend for a moment that a constable can be justified in keeping a person imprisoned for three days before he takes him to a magistrate. The defendants, of their own accords, imprisoned the plaintiff for three days for the purpose of informing the owner of the goods, which had been stolen, that he might procure the necessary evidence. It is the duty of a constable to take a suspected person before a magistrate within a reasonable time after he has him in custody, and the Justice can only detain him a reasonable time for the purpose of examination.—See *Comyn's Digest*, (*Imprisonment*, H. 4). We are all of opinion that the constable had no power to handcuff the plaintiff, without stating that he had attempted to escape.

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SCOTT, *Ex parte*, E. T. 1829. K. B. 4 *M. & R.* 361; S. C. 9 *B. & C.* 446.

The Court refused to discharge a British subject arrested abroad for a misdemeanor, under a Judge's warrant.

A TRUE bill had been found against the prisoner, upon an indictment for perjury; and Lord *Tenterden*, C. J., had granted a warrant for her apprehension to compel her to appear, and plead to the indictment. Accordingly, she was apprehended at Brussels, and conveyed from thence to Ostend, and so to England, and finally before Lord *Tenterden*, who committed her to the King's Bench prison for want of bail. On a habeas corpus, for the purpose of discharging the prisoner out of custody, Lord *Tenterden*, C. J., and *Parke*, J., (*Littledale*, J. dubitante), were of opinion, if the arrest was made in violation of the law of Belgium, the authorities of that country ought to have interfered to vindicate their own law. If it was made in violation of our law, the prisoner has a right of action, and may pursue her legal remedy; but we cannot enquire into the circumstances attending her apprehension, and under which she was brought into this country. We take the law to be, that when a party is solemnly charged, upon the oaths of a grand jury, with the commission of any offence against the public, whether a felony or a misdemeanour, and is found in custody in this country, we think that public justice requires, and that it is the duty of this Court to provide, that if he cannot find bail he shall be detained in custody to answer that charge.

# Arson*.

(2 *Peters. Abr.* 344).

I. WITH RESPECT TO THE SUBJECTS OF.
(*a*) Agricultural produce, p. 385.
(*b*) Churches, chapels, houses, &c., p. 385.
(*c*) Dwelling-houses, some person being therein, p. 386.
(*d*) Coal mines, p. 386.
(*e*) Ships, p. 386.
II. WITH RESPECT TO THE BURNING, p. 387.
III. BY WHOM COMMITTED, p. 387.
IV. INDICTMENT, p. 387.
V. EVIDENCE, p. 388.
VI. PUNISHMENT, p. 388.

## I. WITH RESPECT TO THE SUBJECTS OF.

### (*a*) Agricultural produce†.

Rex *v.* Tottenham, 1835. *M. C. C.* 461; S. C. 7 *C. & P.* 237—S. P. Rex *v.* Reader, 1830. N. P. 4 *C. & P.* 245.

A stack of cole-seed was not a stack of straw within 7 & 8 Geo. 4.

The indictment contained one count for setting fire to a stack of straw. It appeared that the stack consisted partly of cole-seed straw and partly of wheat stubble. The jury thought the stubble was *haulm*—

And *Gaselee*, J., after consulting Lord *Denman*, C. J., directed the prisoner to be acquitted on that count.

### (*b*) Churches, chapels, houses‡, &c.

Rex *v.* Ellison, Sp. Ass. 1832. *Mood. C. C.* 336.

An open shed for cattle and

The building in question stood in an inclosed field a furlong from the dwelling-house, and not in sight thereof. The building had

* The 1 Vict. c. 89, amends and repeals so much of the 7 & 8 Geo. 4, c. 30, as relates to arson.

† By 1 Vict. c. 89, s. 10, it is enacted, "That whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

‡ By 1 Vict. c. 89, s. 3, it is enacted, "That whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of

parts, in a field away from the dwelling-house, was not an out-house within the statute 7 & 8 Geo. 4, c. 30*.

originally been divided into stalls capable of holding eight beasts, partly open and partly thatched.

*Park*, J., at the trial, considered that it was not an out-house within the statute. All the Judges (except Lord *Lyndhurst*, C. B., and *Taunton*, J.,) met and considered this case, and Lord *Tenterden*, C. J., *Bayley*, B., *Littledale*, J., *Vaughan*, B., *Parke*, J., *Bolland*, B., held this to be an out-house within the statute. The other seven learned Judges were of a contrary opinion.

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(*c*) Dwelling-houses, some person being therein†.

(*d*) Coal mines‡.

(*e*) Ships§.

persons dissenting from the united Church of England and Ireland, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hopoast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same, or any of them respectively, shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

* So, a cart-house, consisting of a stubble roof merely supported by uprights in a field, was not within the statute. (*Vaughan*, B.—*Rex* v. *Parrot*, 1834, N. P., 6 C. & P. 402). But a covering of wood and straw, on upright posts and cross timbers, in a farm-yard, was an out-house within the 7 & 8 Geo. 4. (*Rex* v. *Stallion*, Sum. Ass. 1833, N. P., Moo. C. C. 398).

† By 1 Vict. c. 89, s. 2, it is enacted, "That whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and, being convicted thereof, shall suffer death."

‡ By 1 Vict. c. 89, s. 9, it is enacted, "That whosoever shall unlawfully and maliciously set fire to any mine of coal or cannel coal, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

§ By 1 Vict. c. 89, s. 4, it is enacted, "That whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death."

By s. 6, it is enacted, "That whosoever shall unlawfully and maliciously set fire to or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

A pleasure-boat, eighteen feet long, *Patteson*, J., inclined to think was a vessel within the 7 & 8 Geo. 4; (*Rex* v. *Bowyer*, 1831, N. P., 4 C. & P. 559); but, in another case, *Alderson*, B., doubted whether a barge was within the statute. (*Rex* v. *Smith*, 1831, N. P., 4 C. & P. 569).

## II. WITH RESPECT TO THE BURNING.

REX *v.* STALLION, 1833. *Moo. C. C.* 398.

INDICTMENT for setting fire to an out-house. To prove the burning, it was stated there was a good deal of smoke in some straw, and sparks flew out of the straw when pulled out; but there were no sparks upon the building, and no flame was seen.

A fire to produce smoke and sparks, though no actual burning, is a "setting on fire"*.

The prisoner was found guilty. And the Judges held, on a case reserved, that there was a sufficient setting on fire to constitute the offence.

## III. BY WHOM COMMITTED†.

## IV. INDICTMENT.

REX *v.* WOODWARD, 1831. *Moo. C. C.* 323.

INDICTMENT for arson. The offence was laid at the parish of *Normanton-on-the-Would*, in the county of N. It appeared that the out-house was in *Normanton-on-the-Would*, in the county of N., which was a hamlet in the parish of Plumptree, in the county of N. The prisoner pleaded *Not guilty*.

No such parish as that named in the indictment cannot be objected to, under not guilty.

And the Judges held, that a defence that there was no such place in the county could only be taken advantage of by plea in abatement.

REX *v.* WALLIS, 1832. *Moo. C. C.* 344.

INDICTMENT charged the prisoner with setting fire to a certain house, situate in the parish of W., in the possession of the said A. B., with intent thereby, then, and there to injure C. D. It appeared that A. B. was in the wrongful possession of the house, C. D. being the lawful owner; and the question was, in whom the property should be laid.

The property should be laid in the party in possession, though wrongful possession‡.

* In earlier cases it was decided there must be an actual burning. Section 2, in the 7 & 8 Geo. 4, (repealed), as well as in the 1 Vict. c. 89, it will be observed, omits the word "burn," which was in the repealed act of 52 Geo. 3, c. 150, and has only the words "set fire to;" it should seem, however, that burning is still necessary, for some part must necessarily be burnt if it was set on fire. It is not necessary in an indictment to aver that the building was burnt, nor need it be proved that the building was actually consumed. (See *Rex* v. *Salmon*, Russ. & Ry. C. C. 26). But within the 7 & 8 Geo. 4, and the same rule must hold as to 1 Vict., as well as to constitute the offence of arson at common law, it seems, there must be an actual burning of some part of the house, a bare intent or attempt to do it is not sufficient. Where, upon an indictment on the repealed stat. 9 Geo. 1, c. 22, for setting fire to a paper-mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt, the Judges held that it did not amount to an offence within the act. (*Rex* v. *Taylor*, 1 Leach, 49). And where the defendant set fire to a parcel of unthrashed wheat, it was holden not to be within that statute. (*Rex* v. *Judd*, 2 T. R. 255). But the burning and consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. (1 Hawk. c. 39, s. 17; 3 Inst. 66; 1 Hale, 569; Dalt. 506; Jervis' Arch. C. L. 264; and see *Rex* v. *Stallion*, 1833, Moo. C. C. 398).

† A wife who set fire to her husband's house, was not a person within the meaning of the 7 & 8 Geo. 4. (*Rex* v. *March*, 1828, N. P., Moo. C. C. 182).

‡ A house, in part of which a man lives, and other parts of which he lets to lodgers, may be described as his house, though he has taken the benefit of the

*Parke*, J., thought the indictment should have been framed differently, and should have stated the house to be in the possession of A. B., having, at the time of the fire, no lawful possession, but the legal possession being in C. D.

But the Judges met and considered this case, and held that, as A. B. was the actual occupier, the statement was proper and the conviction right.

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REX *v.* NEWILL, 1836. *Moo. C. C.* 458.

An intent to injure need not be stated, and if stated, need not be proved*.

INDICTMENT for setting fire to an out-house with "intent to injure" the prosecutor. There was no evidence of the intent to injure.

*Gaselee*, J., told the jury that the law was, that a person who did an act wilfully necessarily intended that which must be the consequence of the act; and that the consequence here was injury to the prosecutor by the destruction of his property.

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V. EVIDENCE†.

VI. PUNISHMENT‡. See also Div. I., notes.

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**Articled Clerk.** See tit. *Attorney*.

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Insolvent Debtors' Act and executed an assignment including the house, if the assignee has not taken possession; at least, no objection can be made if, in other counts, it is stated as the house of the assignee and in others of the lodger whose room was set fire to. (*Littledale*, J.—*Rex* v. *Ball*, 1824, Moo. C. C. 30).

* But where an indictment on the stat. 7 & 8 Geo. 4, c. 30, ss. 2 & 17, for setting fire to a barn and a stack of straw, charged the offences to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously," held bad. (*Parke*, J.—*Rex* v. *Reader*, Sp. Ass. 1830, 4 C. & P. 245. *Patteson*, J.—*Rex* v. *Swakins*, 1831, N. P., 4 C. & P. 548).

† Proof of setting fire to a stack which communicates to a barn, sustains an indictment for burning a barn. (*Parke*, J.—*Rex* v. *Cooper*, 1833, N. P., 5 C. & P. 535). But an indictment for setting fire to a stack of wood is not proved by shewing that a score of faggots was placed one above another in a loft. (*Parke*, J.—*Rex* v. *Aris*, 1834, 6 C. & P. 348). Where it is stated that expressions of ill-will would be proved to have been used by the prisoner against the prosecutor:—Held, that the prosecutor might be asked if others had not used similar expressions. (*Rex* v. *Stallard*, 1835, N. P., 7 C. & P. 263).

In *Rex* v. *Ellicombe*, 1833, N. P., 5 C. & P. 522, a prisoner, tried at the assizes for arson on Wednesday the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission-day was *Friday* the 15th, and the prisoner's house was ten miles from the assize town:—Held, that the notice was served too late: held, also, that the intent to defraud an insurance office being charged in the indictment, was not such notice to the prisoner as would make a notice to produce the policy unnecessary.

‡ By 1 Vict. c. 89, s. 12, it is enacted, "That where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the county gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

By sect. 14, it is enacted, "That, where any felony, punishable under this act, shall be committed within the jurisdiction of the Admiralty of England, or of Ireland, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction.

# Articles of the Peace*.

(2 *Peters. Abr.* 358).

REX *v.* HOLLOWAY, E. T. 1834. K. B. 2 *D. P. C.* 525.

The amount for which articles of the peace are entered into before a justice cannot be reduced by the Court of K. B.

THE defendant, a publican, had sent a letter to A., a magistrate, which the latter considered as intended to provoke him to fight a duel. A. accordingly applied to the magistrates, and they required the defendant to enter into his recognizances in 500*l.* and to obtain two sufficient securities in 250*l.* each to keep the peace for two years towards A. and all others of his Majesty's subjects. The defendant not being prepared with the two securities, remained in custody until the time of the assizes, when he was tried on an indictment, found guilty, and fined. Still, however, as he had been unable to procure the two securities required, he was detained in custody. On motion to reduce the amount—

*Taunton*, J., said the Court had no power to reduce the amount of the security required by the magistrates; they were the conservators of the peace, and the amount of the security which the defendant was to find was in their discretion.

REGINA *v.* JUSTICES OF YORKSHIRE, M. T. 1837. K. B. 7 *Ad. & E.* 583.

Nor can the sessions order recognizances to keep the peace to be estreated; the proceedings must be by scire facias.

A. B. in April, 1836, was bound in recognizances to keep the peace against C. D. and all his Majesty's subjects for the space of two years; and, in the month of July following, was convicted by three justices of the peace for an assault upon one W. P. At the ensuing October sessions the recognizance of A. B. was ordered, upon motion, to be estreated. On a rule to remove into this Court the recognizance, the conviction, and the order of sessions—

The Court held, that the Quarter Sessions are not authorized under statute 3 Geo. 4, c. 46, to order an estreat of the recognizance, but the proceeding for that purpose must be by scire facias. If a man be bound in recognizances to the King, upon condition to be of good behaviour, &c., he cannot be indicted for breach of the good behaviour without a scire facias; for if the scire facias had been brought, he might have pleaded some matter in discharge thereof. And the cases in Bac. Ab., tit. *Scire Facias*, shew that a scire facias has always been brought under such circumstances; and, on inquiry, we find that the course of practice in the Crown office has been uniform with what is there stated.

# Artificers†. (2 Peters. Ab. 362).

* If, after the grand jury are discharged, a prisoner charged with maliciously shooting is acquitted, the Judge will not order the prisoner to be detained while articles of the peace against the prisoner are prepared. (*Littledale*, J.—*Rex* v. *Holt*, 1836, N. P., 7 C. & P. 518).

† By 5 Geo. 4, c. 97, the statutes relating to artificers going into foreign parts are repealed.

# Assault and Battery.

(2 *Peters. Ab.* 364).

I. WHAT CONSTITUTES AN ASSAULT, BATTERY, AND WOUNDING, p. 390.

II. WHO LIABLE FOR, p. 392.

III. OF THE REMEDIES.

(*a*) By action.

1. *Pleas,* p. 392.
2. *Replication,* p. 393.
3. *Rejoinder,* p. 394.
4. *Evidence,* p. 395.
5. *Damages,* p. 396.
6. *Verdict,* p. 396.
7. *Costs,* p. 396.

(*b*) By indictment.

1. *When Indictable,* p. 398.
2. *Assaulting, with intent to rob,* p. 398.
3. *Of the Indictment,* p. 398.

(*c*) By action and indictment for the same assault, 398.

## I. WHAT CONSTITUTES AN ASSAULT, BATTERY, AND WOUNDING.

Timothy *v.* Simpson, H. T. 1835. Ex. 1 *C., M., & R.* 757; S. C. 5 *Tyrw.* 244; S. C. 6 *C. & P.* 499.

It is not an assault for a person who witnesses an affray to give the party into custody*;

The defendant was a linen-draper; the plaintiff was passing his shop, and seeing an article in the window with a ticket apparently attached to it, denoting a low price, sent his companion in to buy it. The shopmen refused, and demanded a larger price. The plaintiff went in himself and required the article at the lower rate. The shopmen still insisted on a greater price; the plaintiff called it an

* So, a landlord is justified in turning out a party coming into his house and conducting himself disorderly; and, after requesting him to depart, may lay hands on him to turn him out, although disorderly conduct does not amount to a breach of the peace. And, if the party resists and lay hands on the landlord, it will be an unjustifiable assault on him. (*Howell* v. *Jackson,* M. T. 1834, N. P., 6 C. & P. 723). An assault is committed by riding after a party and compelling him to run into a place of safety; (Lord *Tenterden,* C. J.—*Mortin* v. *Shoppee,* T. T. 1828, N. P., 3 C. & P. 373); or by advancing with a clenched fist, though not near enough to have given a blow, being prevented. (*Tindal,* C. J.—*Stephens* v. *Myers,* T. T. 1830, N. P., 4 C. & P. 349). So, collaring a man to prevent his committing a nuisance against a blank wall at night. (*Abbott,* C. J.—*Booth* v. *Hanley,* T. T. 1826, N. P., 2 C. & P. 288). Or cutting off the hair of a pauper in a workhouse, against her consent. (*Bayley,* J.—*Forde* v. *Skinner,* Sp. Ass. 1830, N. P., 4 C. & P. 239). Or, if a bye-stander in a fight be struck by one of the pugilists, though unintentionally it is an assault. (*Bosanquet,* J.—*James* v. *Campbell,* E. T. 1832, N. P., 5 C. & P. 372).

imposition; some of the shopmen desired him to go out of the shop in a somewhat offensive manner; he refused to go without the article, at the price he bid for it. The shopmen pushed him out Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop-door: the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on; many persons were there, and others about the street-door. The noise brought down the defendant, who was sitting in the room above; and when he came down, he found the shop in disorder and the plaintiff on the ground, struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence. The defendant, thereupon, gave the plaintiff into custody of a policeman. In an action of trespass for an assault—

The Court held, that a party who has witnessed an affray is justified in giving one of the affrayers in charge to a constable on the very spot where it was committed, and whilst there is a reasonable apprehension of its continuance. And that there was no pretence for saying that the act amounted to an assault.

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HARRISON *v.* HODGSON, H. T. 1830. K. B. 10 *B. & C.* 445; S. C. 5 *M. & R.* 392.

nor is an assault committed by touching a party on serving him with process.

To an action for assault and false imprisonment the defendant pleaded son assault demesne in the presence of a peace-officer, to whose custody defendant gave the plaintiff. The plaintiff replied that he was employed to serve the defendant with process, and, in order to do so, necessarily laid his hands on the defendant. The defendant rejoined, that in this the plaintiff was guilty of more violence than was necessary; and, upon this, issue was joined. After verdict for the plaintiff, it was moved, in arrest of judgment, that the replication was ill, inasmuch as it could not be necessary, in order to serve process, that the plaintiff should lay his hands on the defendant—

The Court held, that, by the rejoinder, the defendant admitted that if, in any case, it might be necessary, in order to serve such process, to touch the party, it was in that case; and, semble, it may, under circumstances, be lawful so to do.

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PURSELL *v.* HORNE, T. T. 1838. Q. B. 3 *N. & P.* 564; S. C. 8 *Ad. & E.* 602.

But throwing water on another constitutes a battery*

IN trespass, the declaration stated that defendant cast and threw divers large quantities of boiling water on the plaintiff, and also then wetted, damaged, and spoiled the clothes and wearing apparel of the plaintiff; to wit, &c., which the plaintiff then wore and was clothed with; by means of which, &c., the plaintiff was then greatly hurt, scalded, and wounded, &c. It was contended that this did not amount to a battery.

* And a wounding is established by shewing that the skin was merely broke and bled. (Lord *Lyndhurst*, J.—*Moriarty* v. *Brookes*, M. T. 1834, N. P., 6 C. & P. 684).

*Sed per Cur.*—A battery includes all cases where a party is struck by any missile thrown by another. Unless we were to hold that throwing boiling water on a person was a battery, the wounding a person with a ball from a pistol, under circumstances not amounting to a felony, would not be a battery.

## II. WHO LIABLE FOR.

TIMOTHY *v.* SIMPSON, H. T. 1835. Ex. 1 *C., M., & R.* 757; S. C. 5 *Tyrw.* 244; S. C. 6 *C. & P.* 499.

A master is not liable for an assault by his servant though he afterwards gave the party into custody.

IN an action of assault it appeared that the plaintiff having entered a shop, and, upon some dispute with the defendant's shopmen about the price, was desired to leave it, and a scuffle ensued with them; during which the defendant came and gave the plaintiff into custody:—

The Court held, that the defendant was not liable for the previous assault by his servants, and that the plaintiff was a trespasser by continuing in the shop after being desired to leave it.

## III. OF THE REMEDIES.

### (*a*) BY ACTION.

#### 1. *Pleas.*

BLUNT *v.* BEAUMONT, T. T. 1835. Ex. 2 *C., M., & R.* 412; S. C. 4 *D. P. C.* 219.

A plea justifying an assault and battery is good, if it can be made so by supplying the word "and*."

TO trespass and assault and battery with stick and fists. The defendant pleaded, "as to the assaulting the plaintiff with the said stick, and with his the defendant's hands and fists giving and striking the plaintiff blows and strokes as in the declaration mentioned," son assault demesne. At the trial it was proved that the defendant struck the plaintiff a blow with his stick, which, it was objected, the plea did not cover.

*Per Cur.*—The meaning of the plea is sufficiently clear; by suspending the breath after the word "plaintiff," the same construction would be given as if the word "and" were there; and that is the construction that must have been intended, for there was nothing in the case to lead to a supposition that the defendant did not intend to justify the battery with the stick as well as the assault with it. It appears to be a mere clerical error in leaving out the word "and."

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BUSH *v.* PARKER, T. T. 1834. C. P. 1 *Bing. N. S.* 72.

A plea justifying an assault, battery, seizing,

IN assault and battery and forcing him out of a certain field into and through a pond, and there imprisoning him: plea, justifying the assaulting, seizing, and laying hold of the plaintiff, and pulling

* Throwing a stone is an assault not to be justified, unless the plea shews there was no other remedy, or immediate danger. (*Tindal*, C. J.—*Eyre* v. *Norsworthy*, H. T. 1831, N. P., 4 C. & P. 502).

A certificate by magistrate under 9 Geo. 4, c. 31, must be specially pleaded. (*Gurney*, B.—*Harding* v. *King*, E. T. 1834, N. P., 6 C. & P. 427).

and dragging him about. The jury found for the plaintiff as to the imprisonment, and for the defendant as to the residue. On motion to set the verdict aside—

laying hold of, pulling and dragging the plaintiff, does not comprehend an imprisonment if the declaration charges the defendant with it, though committed by the assault.

*Per Cur.*—The question is, whether the imprisonment is answered by the plea. The declaration alleges that the defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. Having got the plaintiff out of the field, the defendants have shewn no reason for getting him into the pond. That was a substantive trespass, for which the plaintiff is entitled to retain his verdict.

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OAKES *v.* WOOD, M. T. 1837. Ex. 3 *M. & W.* 150.

Pleas; 1st, justifying assaulting, beating, and ill-treating in defence of possession; 2nd, son assault:—Held, not to justify a striking with a bludgeon.

IN an action of trespass the declaration stated the assault to be a beating with a bludgeon; and the pleas, as to the assaulting, beating, and ill-treating—first, a justification of molliter manus to remove the plaintiff from the defendant's house; and, secondly, son assault demesne; and the judge directed the jury that the striking with a bludgeon would not be justified on those pleas.

The Court held it a misdirection; but, entertaining some doubt whether the pleas, inasmuch as they professed only to justify the "assaulting, beating, and ill-treating," were an answer to so much of the charge as related to the striking and pushing down with the bludgeon, they suggested that the verdict should be entered for the defendant on the special pleas; the plaintiff being at liberty to move to enter judgment for him non obstante veredicto.

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SKUSE *v.* DAVIS, T. T. 1839. Q. B. 7 *D. P. C.* 774.

Where a justice's certificate is pleaded under 9 Geo. 4, to an action of assault, the grounds on which it was founded must be stated*.

To an action of trespass for assault and battery, the defendant pleaded that he had been discharged by the certificate of two magistrates under 9 Geo. 4, c. 31, ss. 27, 29. On demurrer: because it does not appear in or by the plea on what grounds the said justices dismissed the complaint therein mentioned; and, also, said for that it does not appear in or by the plea that the said justices had any jurisdiction to decide upon the said complaint; or that the plaintiff caused the defendant to be summoned before the said justices; or that the defendant was summoned before the said justices. And also, for that it is not positively and expressly stated that the said justices ever heard the said complaint of the plaintiff.

The Court held, it was a bad plea. Some meaning to the words of the act, which requires the fact of dismissal to be stated, must be given; and we think the act means that the certificate shall specify those facts.

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### 2. *Replication.*

DALE *v.* WOOD, E. T. 1822. C. P. 7 *Moore*, 33.

Under de injuriâ, to plea of son assault demesne, a justification of the assault can-

To a declaration for an assault, charging the defendant with having beaten, bruised, wounded, and ill-treated the plaintiff, the defendant pleaded son assault demesne, and the plaintiff replied de injuriâ suâ propriâ. At the trial, it appeared that the plaintiff, being on horseback, dismounted and held up his stick at the defendant, when the latter struck him.

* Such a defence must be the subject of a special plea. (*Gurney*, B.—*Harding* v. *King*, E. T. 1834, N. P., 6 C. & P. 427).

not be given in evidence*.

The Court held, that the plaintiff ought to have replied specially, and, the jury having found for the defendant, refused a new trial.

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PENN *v.* WARD, T. T. 1835. Ex. 2 *C., M., & R.* 338; S. C. 4 *D. P. C.* 215.

So, in assault for beating an apprentice; plea, moderate correction:—Held, that it was *immoderate*, could not be shewn under replication de injuriâ.

TRESPASS for assault and battery. Plea: that the plaintiff was defendant's apprentice, and that he moderately chastised him. Replication: de injuriâ. The jury found that the beating was given by way of correction, and, on the ground of disproportionate punishment, gave the plaintiff a verdict. On motion to set the verdict aside—

*Per Cur.*—The replication of de injuriâ merely puts in issue whether the defendant, as the master of the plaintiff who was his apprentice, had a right to administer correction to him for his contumacy; instead, therefore, of replying de injuria, the plaintiff should have submitted that the defendant was justified in correcting him, but should have now assigned the excess.

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KINGSBURY *v.* COLLINS, E. T. 1827. C. P. 4 *Bing.* 202.

To a plea moliter manus, &c. to remove plaintiff from close, of which defendants were in possession: replication, that defendants had nothing in the close, but under A., who had before demised to B., under whom plaintiff claimed a licence for a temporary purpose—held sufficient.

IN trespass for assault and imprisonment, the defendants pleaded that the plaintiff was trespassing on their close, and they removed him. The replication stated that the defendants had nothing in the close except under R. N. C.; that, before they had any thing in the close, W. C. held it as tenant, from year to year, of R. N. C.; that W. C. permitted the plaintiff and one D. to plant teasles in the close—W. C. to have one half and plaintiff and D. the other; and that the plaintiff had entered the close to take his and D.'s share. On demurrer, because W. C.'s interest was not alleged to be continuing when the plaintiff entered—

The Court held, that, as it sufficiently appeared upon the pleadings, that the plaintiff had a right to be in the close in question at the time, the replication was a sufficient answer to the pleas; and that it was immaterial in whom the possession of the close was for general purposes, the plaintiff would still have his right to take the teasles as emblements, though his tenancy might be determined before they were gathered.

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### 3. *Rejoinder.*

MORROW *v.* BELCHER and Others, M. T. 1825. K. B. 4 *B. & C.* 704.

The rejoinder must strictly

THE plaintiff declared in trespass against three persons. They all pleaded the general issue; and one of them also pleaded a justi-

* So, where plaintiff declared in trespass, in several counts, for assaulting and imprisoning on board of ship, defendant pleaded—1st, general issue; 2nd, that the several trespasses in the several counts were one and the same assault, and justified as necessary for the preservation of discipline, &c.; to which plaintiff replied de injuriâ generally, and issue thereon:—Held, that, by the pleadings, the plaintiff had narrowed the question to one transaction; and the jury could only consider whether, on the occasion justified by the plea, the defendant had misconducted himself as stated therein. (*Gale v. Dalrymple*, T. T. 1824, 1 Ry. & M. (N. P.) 118; and 1 C. & P. 381).

fication in defence of his freehold. Replication: that he used more force than was necessary. Rejoinder: that all the defendants did not use more force than was necessary. Demurrer and rejoinder.

pursue the replication.

*Per Cur.*—We are of opinion that the rejoinder is bad in law. It is a fundamental rule in pleading that the replication must pursue the plea, and that the rejoinder must be adapted to the replication. The plaintiff has declared that three persons committed a trespass. Two of them deny the fact: the third says that he was justified in what he did. What other course could the plaintiff pursue, but that of joining issue with those who denied the fact, and traversing the justification of the other person? It is quite absurd that parties should plead a rejoinder to a replication to a plea in which plea they did not join.—*Judgment for the plaintiff.*

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### 4. *Evidence**.

**Reece** *v.* **Taylor**, H. T. 1835. K. B. 4 *N. & M.* 470.

To support the plea of son assault an assault co-extensive with the trespass complained of must be proved.

Declaration for assault and imprisonment. Plea, that defendant was in lawful possession of a house, and that the plaintiff was unlawfully therein, and had been requested to depart, but had refused, whereupon the defendant gently laid his hands on him to remove him; that thereupon the plaintiff assaulted him, in the presence of a policeman, wherefore he caused him to be taken to a police-office. Replication, de injuriâ. The defendant proved all the matters of the plea, except the assault by the plaintiff.

*Per Cur.*—Under the plea of an assault demesne the defendant must shew an assault by the plaintiff, commensurate with the act complained of by the plaintiff.

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**Dobson** *v.* **Fussey**, H. T. 1831. C. P. 7 *Bing.* 305; S. C. 5 *M. & P.* 112.

And, to support a plea that the defendants, as vestrymen, "duly assembled," removed the plaintiff, an intruder, they must prove to have been duly assembled†.

In an action for an assault, the defendants pleaded, by way of justification, that they were duly assembled as a select vestry in the parish school-room, and that the plaintiff intruding therein they turned him out. The evidence shewed that the vestrymen named were assembled on a special occasion, and on an unusual day, to discuss parish business; that no notice of the meeting had been given, that the plaintiff, who was not a select vestryman, endeavoured to force himself into the room, and was violently turned out by the defendants.

*Per Cur.*—The defendants failed to prove that they were a select vestry, duly assembled. It would be dangerous, if three or four

* A letter from the plaintiff's attorney for an apology can only be read so far as it simply asks for the apology, and not any part which refers to the respectability of the attorney's client; and if stated to be "without prejudice," no part can be read at all. (*Gurney*, B.—*Healey* v. *Thatcher*, 8 C. & P. 388). In an action of assault, what was said by the magistrate to the plaintiff at a previous investigation of the circumstances before him, cannot be received in evidence at the trial on the part of the defendant, unless it drew any observations in reply from the plaintiff. (*Best*, C. J.—*Child* v. *Grace*, M. T. 1825, N. P., 2 C. & P. 193).

† And to justify an assault in removing a party from a vessel, the party justifying must have a possession and prove it. (*Alderson*, J.—*Dean* v. *Hogg*, T. T., 1833, N. P., 6 C. & P. 54). Hence, a molliter manus to expel, &c., is supported by shewing that the defendant was possessed, as carpenter, having the key of the house, as agent or workman. (*Best*, C. J.—*Hall* v. *Davis*, E. T. 1825,

out of twenty might agree amongst themselves to meet on a given day, without notice to the rest. Unless the defendants were duly assembled as a select vestry, they had no authority to turn out the plaintiff.

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5. *Damages**.

6. *Verdict.*

STAMMERS *v.* YEARSLEY, T. T. 1835. C. P. 10 *Bing.* 35; S. C. 3 *M. & Scott*, 410.

On a plea not answering the whole matters of the declaration, the plaintiff is entitled to a verdict, although only one assault be proved.

IN an action of trespass, for assaulting the plaintiff, and compelling him to go to a certain building, and for imprisoning plaintiff upon a false charge of assault, with intent to commit felony, as to which, in one plea, the defendant justified the assault and part of the imprisonment, alleging, that the plaintiff having assaulted the defendant, he gave him in charge of a peace-officer to be taken before a justice and dealt with. The allegations in the declaration being proved, the Court held that the plea, not answering the whole matters of the declaration, was insufficient, and the plaintiff entitled to a verdict, although only one assault was proved.

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7. *Costs*†.

WEATHERALL *v.* HOWARD, T. T. 1825. C. P. 3 *Bing.* 135; S. C. 10 *Moore*, 502.

To a declaration for assault, battery, and tearing clothes, plea, that the defendant "is not guilty of the assaults in manner and form," &c.: verdict 20*s.*:—Held not to carry increased costs.

DECLARATION that the defendant assaulted the plaintiff, and beat, wounded, and ill-treated him, and rent and tore his clothes; and the defendant pleaded that he was not guilty of the supposed assaults above laid to his charge, in manner and form as the plaintiff had complained against him; and the jury found a verdict for the plaintiff, damages 20*s.*

The Court were of opinion the plaintiff was not entitled to his full costs, as the plea stated that the defendant had not been guilty of the assaults above laid to his charge, in manner and form, as the plaintiff had complained against him; although the plea might be inaccurately drawn, by not inserting the word "trespasses," yet, that such omission would not entitle the plaintiff to full costs, he having joined issue on the plea, and made no award of inquiry of damages for the battery and tearing of his clothes, which clearly shewed that such injury was merely laid as consequential damages, and formed part of the assault.

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BRIGGS *v.* BOWGIN, M. T. 1824. C. P. 2 *Bing.* 333; S. C. 9 *Moore*, 628.

1st count for an

IN trespass for an assault, the declaration contained two counts,

N. P., 2 C. & P. 33). Though under plea of molliter manus imposuit to several counts, plaintiff cannot prove excess unless he has new assigned. (*Best*, C. J. —*Bowen* v. *Parry*, T. T. 1824, N. P., 1 C. & P. 394). A plea of son assault demesne is not proved by shewing that a party put himself in a fighting position, if with the view of defending himself. (*Lyndhurst*, C. B.—*Moriarty* v. *Brooks*, M. T. 1834, N. P., 6 C. & P. 684).

* In an action for an assault, that the plaintiff published a libel on the defendant cannot be given in evidence in mitigation of damages. (*Fraser* v. *Berkeley*, 1836, N. P., 7 C. & P. 621.

† See 3 & 4 Vict. c. 24.

one for assaulting the plaintiff, and the other for a false imprisonment, (which includes a battery), and the jury found a general verdict for him, damages 1*s*. Chief Justice *Abbott*, before whom it was tried, certified, under the 43 Elizabeth, c. 6, that the damages amounted to 1*s*. only.

assault; 2nd, for imprisonment; damages 1*s*.:—Held, that the Judge might certify under the 43 Eliz.

The Court held, that it was immaterial whether the assault were laid in one or two counts, and that, as the gist of the action was founded on personal injury, the Judge was perfectly right in acting as he had done.

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BONE *v.* DAWE, T. T. 1835. K. B. 3 *A. & E.* 711; S. C. 5 *N. & M.* 230.

IN trespass, the declaration was for assaulting and beating plaintiff, imprisoning him for a long time, and during that time tearing his clothes. Defendant pleaded the general issue; and, as to the assaulting, beating, and tearing the clothes, a justification. Plaintiff had a verdict for 1*s*. The Judge certified, to deprive of costs, under stat. 43 Eliz. c. 6, s. 2, and did not certify under stat. 22 & 23 Car. 2, c. 9, s. 136, that a battery was proved.

Aliter, where the action is for a battery, which is admitted by a justification.

*Per Cur.*—Under 43 Eliz. c. 6, it is clear that the learned Judge had not power to grant this certificate. The action was for a battery; then, by the stat. of Charles, in all actions of trespass, assault, and battery, where the Judge at the trial shall not certify that a battery was sufficiently proved, and the jury shall not find 40*s*. damages, the plaintiff shall not recover more costs than damages. Here, therefore, the plaintiff was primâ facie debarred from recovering his full costs. But then it has been held, that the admission of a battery, by a special plea, supersedes the necessity of a certificate under the stat. of Charles.

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WILSON *v.* LAINSON, M. T. 1836. C. P. 3 *Bing. N. S.* 307; S. C. 3 *Scott*, 676; S. C. 5 *D. P. C.* 339.

IN trespass, for an assault, battery, and imprisonment, of the plaintiff's wife, the defendant pleaded, first, not guilty; secondly, that the individual was not the plaintiff's wife; thirdly, a justification under process against her. A verdict was found for the plaintiff on the first and second pleas, with a farthing damages, and for the defendant on the third plea. *Bosanquet*, J., thereupon certified under the stat. 43 Eliz. c. 6, s. 2. On motion to discharge the certificate—

To an action for assaulting the plaintiff's wife, plea, that she was not the plaintiff's wife:—Held, no admission of the battery with respect to costs.

*Per Cur.*—Taking the whole of the record together, there is no necessary confession of the battery on this record. The plea of not guilty expressly denies it; the last plea, which is a plea in confession and avoidance, excludes the battery. The question therefore arises on the second plea alone: this is not in its form a plea of confession and avoidance, it is a plea of traverse, or denial of a particular collateral fact alleged in the declaration; and if this plea had been pleaded alone, although the plaintiffs might contend that a cause of action was admitted by the defendants, yet they never could have contended that the whole of their ground of action was admitted, for their cause of action in this case is several and divisible. The admission, therefore, of a ground of action that is divisible we consider no necessary admission of the whole, but that the plaintiffs must still prove, at the trial, what part of their

gravamen they rely on. Holding, therefore, that there is no necessary admission of a battery on this record, we think that the certificate of the Judge, certifying under the stat. of Elizabeth, deprived the plaintiffs of full costs.

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(*b*) By indictment.

1. *What indictable*.*

2. *Of assaulting, with intent to rob†.*

3. *Of the indictment.*

Rex *v.* Ford, H. T. 1835. K. B. 4 *N. & M.* 451.

An indictment for assaulting a person who has distrained, if it states the sum levied, it must be proved as stated.

A count in an indictment stated that the defendant made an assault upon a person who was in lawful possession of goods under a levy, for a specified sum of money, for arrears of assessed taxes, with intent unlawfully to force him out of possession. It was objected, that to support the indictment the precise sum stated in the indictment, for which the distress was made, and that the sum was due, must be proved.

Lord *Denman*, C. J.—The sum need not have been stated; but that being stated it must be proved as laid.

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(*c*) By action and indictment for same assault‡.

* There is no rule of law which compels one brother to support another, even though he be an inmate of his house, and helpless; and, therefore, the omission to supply him with the requisite food and warmth is not indictable, and does not constitute an assault. (*Burrough*, J.—*Rex* v. *Smith*, Sp. Ass., 1826, 2 C. & P. 449). An attempt to commit an indecent assault is indictable as a misdemeanor. (*Rex* v. *Butler*, 6 C. & P. 368). A person who puts a deleterious drug into coffee, in order that another may take it, is, if it be taken, guilty at common law of an assault upon the person who takes it. (Before *Arabin*, C. S.—*Regina* v. *Button* 1838, N. P., 8 C. & P. 660). A party was indicted for a highway robbery, accompanied by violence, under the stat. 7 Will. 4 & 1 Vict. c. 87, s. 3. The jury pronounced the following verdict:—We find the prisoner guilty of an assault, but without any intention to commit any felony:—Held, that such special finding did not take the case out of the operation of the stat. 7 Will. 4 & 1 Vict. c. 88, s. 11, and the prisoner was sentenced under it to imprisonment, with hard labour, for the assault. (The *Recorder.—Regina* v. *Ellis*, 1838, N. P., 8 C. & P. 654). Where a felony includes an assault the prisoner may be convicted of the assault if there be one good count in the indictment. (*Gurney*, B.—*Regina* v. *Nicholls*, 1840, 9 C. & P. 267). But, on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felonious charge; but on such an indictment the prisoner ought only to be convicted of an assault, which is involved in the felony. (*Parke*, B.—*Regina* v. *St. George*, 1840, N. P., 9 C. & P. 483).

† To constitute an assault with intent to rob, under 7 & 8 Geo. 4, c. 49, s. 6, the party must have been in peaceable possession of the thing taken. Hence, where a man was decoyed into a house, and chained down to a seat, and compelled to write an order for the payment of money and delivery of deeds:—Held, not an assault with intent to rob, within the 7 & 8 Geo. 4. (*Patteson*, J.—*Rex* v. *Edwards*, July Sessions, 1834, N. P., 6 C. & P. 521). But that statute applies to a case where a person, with menaces, demands a sum of money of another, who does not give it to him, because he has it not. (*Patteson*, J.—*Rex* v. *Edwards*, July Sessions, 1834, 6 C. & P. 515).

‡ After indictment for an assault, and receipt of portion of a fine, where no personal injury. In an action for the same assault, the plaintiff is entitled to nominal damages. (*Tenterden*, C. J.—*Jacks* v. *Bell*, H. T. 1828, N. P., 3 C. & P. 316).

**Assets***. See also tit. *Executor and Administrator.*

**Assizes†.**

**Assistance, Writ of.** See tit. *Excise and Customs.*

# Assumpsit, Action of.

## I. WHEN IT LIES IN GENERAL, p. 405. See also tits.

*Accounting, Action for not,*
*Account stated,*
*Action,*
*Apothecary,*
*Apprentice,*
*Arbitration,*
*Auction and Auctioneer,*
*Bail,*
*Bailment,*
*Banker,*
*Bank Note,*
*Bank of England,*
*Bankrupt,*
*Baron and Feme,*
*Barrister,*
*Bastard,*
*Bills of Exchange and Promissory Notes,*

* By 1 Will. 4, c. 47, real estates of traders to be administered as assets in Courts of Equity. And, by 3 & 4 Will. 4, c. 104, it is enacted, "That when any person shall die seised of, or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not, by his last will, have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to, in respect of such freehold estates at the suit of creditors by specialty, in which the heirs were bound: Provided always, that in the administration of assets, by Courts of Equity, under and by virtue of this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors, by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

† By 1 Geo. 4, c. 55, it shall and may be lawful for the Justices of the Courts of King's Bench and Common Pleas, and the Barons of the Exchequer at Westminster, (and the Justices of Chester), and each and every, or any one of them, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders in all actions or prosecutions which are or shall be depending in any of his Majesty's Courts of Record at Westminster, in which the issue, if brought to trial, would be to be tried upon such their respective circuits, as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, (and Justices of Chester), were respectively Judges of the Court in which such actions or prosecutions are or shall be depending, although such respective Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, (and Justices of Chester), or any of them, may not be Judges of the Court in which such actions or prosecutions are or shall be depending; and such summonses and orders shall be of the same force and effect as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer at Westminster, (and Justices of Chester), were respectively Judges of the Court in which actions or prosecutions are or shall be depending.

*Bill of Lading,*
*By-Law,*
*Calls,*
*Canal,*
*Carrier,*
*Check,*
*Chose in Action,*
*Churchwardens and Overseers,*
*Composition with Creditors,*
*Contract,*
*Contribution,*
*Copyright,*
*Debtor and Creditor,*
*Deceit,*
*Demurrage,*
*Distress,*
*Ecclesiastical Persons,*
*Election,*
*Exchange,*
*Executor and Administrator,*
*Feigned Issue,*
*Fixtures,*
*Frauds, Statute of,*
*Freight,*
*Gift,*
*Goods bargained and sold,*
*Goods sold and delivered,*
*Guarantee,*
*Indemnity,*
*Infant,*
*Innkeeper,*
*Insolvent Debtors,*
*Insurance,*
*Interest,*
*Joint Stock Company,*
*Judgment,*
*Landlord and Tenant,*
*Legacy,*
*Lien,*
*Lottery,*
*Maintenance,*
*Marriage, Promise of,*
*Master and Servant,*
*Money had and received,*
*Money lent and advanced,*
*Money paid,*
*Mortgage,*
*Officer,*
*Pardon,*
*Parent and Child,*
*Partner,*
*Party Walls,*
*Physician,*
*Poundage,*
*Principal and Agent,*
*Principal and Surety,*
*Printer,*
*Prize,*
*Proctors,*
*Prostitution,*
*Rent,*
*Respondentia,*
*Reward,*
*Salvage,*
*Sheriff,*
*Ship and Shipping,*
*Simony,*
*Smuggling,*
*Spirituous Liquors,*
*Stipulated Damages,*
*Stocks,*
*Sunday,*
*Surveyor,*
*Tithes,*
*Tolls,*
*Trustees,*
*Use and Occupation,*
*Vendor and Purchaser,*
*Wager,*
*Warranty,*
*Waste.*
*Witness,*
*Work and Labour.*

II. WHEN THE ONLY REMEDY. See tits.

*Arbitration,*
*Bill of Exchange and Promissory Note,*
*Guarantee,*
*Instalments.*

III. WHEN NOT SUSTAINABLE. See tits.

*Action,*
*Charterparty,*
*Corporation,*
*Covenant,*
*Deceit,*
*Deed,*
*Partner,*
*Penal Statutes,*
*Qui tam Action,*
*Rent.*

IV. OF THE CONSIDERATION TO SUPPORT THE ACTION. See tit. *Contract.*

V. WHEN IT SHOULD BE INDEBITATUS, OR SPECIAL, p. 408. See also tits.

*Attorney,*
*Auction and Auctioneer,*
*Bail,*
*Bills of Exchange and Promissory Notes,*
*Calls,*
*Carrier,*
*Composition with Creditors,*
*Contract,*
*Demurrage,*
*Deposit,*
*Exchange,*
*Fixtures,*
*Freight,*
*Goods bargained and sold,*
*Goods sold and delivered,*
*Guarantee,*
*Indemnity,*
*Insurance,*
*Interest,*
*Landlord and Tenant,*
*Master and Servant,*
*Money had and received,*
*Money lent,*
*Money paid,*
*Party Walls,*
*Reward,*
*School and Schoolmaster,*
*Stipulated Damages,*
*Tolls,*
*Trustee,*
*Use and Occupation,*
*Vendor and Purchaser,*
*Wages,*
*Work and Labour.*

VI. WHETHER ASSUMPSIT OR ACCOUNT. See *ante,* tit. *Action.*

VII. WHETHER ASSUMPSIT OR COVENANT. See *ante,* tit. *Action.*

VIII. WHETHER ASSUMPSIT OR DEBT. See *ante,* tit. *Action.*

IX. WHETHER ASSUMPSIT OR TORT. See *ante,* tit. *Action.*

X. PARTIES TO THE ACTION IN GENERAL, p. 409. And see also tits.

*Alien,*
*Apprentice,*
*Auction and Auctioneer,*
*Bailment,*
*Bankrupt,*
*Baron and Feme,*
*Bills of Exchange and Promissory Notes,*
*Carrier,*
*Charterparty,*
*Churchwarden,*
*Contract,*
*Copyhold,*
*Copyright,*
*Corporation,*
*Demurrage,*
*Executor and Administrator,*
*Freight,*
*Infant,*
*Insolvent Debtor,*
*Insurance,*
*Landlord and Tenant,*
*Lunatic,*
*Mortgage,*
*Parent and Child,*
*Partner and Partnership,*
*Party Wall,*
*Principal and Agent,*
*Principal and Surety,*
*Reward,*
*Salvage,*
*Sheriff,*
*Ship and Shipping,*
*Taxes,*
*Trustee,*
*Use and Occupation.*

XI. HOLDING TO BAIL, IN. See tit. *Affidavit of Debt.*

XII. DECLARATION.

(*a*) TITLE OF THE COURT. See tit. *Declaration.*

(*b*) VENUE. See tits. *Contract—Declaration.*

(*c*) DAY. See tits. *Contract—Declaration.*

(*d*) GENERAL REQUISITES IN A SPECIAL ASSUMPSIT.

1. *Inducement, statement of, with a quod cum.* See tit. *Contract.*
2. *Inducement, not vitiated by Uncertainty.* See tit. *Contract.*
3. *Should be capable of Proof.* See tit. *Contract.*
4. *Inducement when special Character of the Party stated.* See tit. *Contract.*
5. *In particular Actions.* See tits.

*Exchange,*
*Executors and Administrators,*
*Forbearance,*
*Freight,*
*Landlord and Tenant,*
*Marriage, Promise of,*
*Money had and received,*
*Poundage,*
*Work and labour.*

(*e*) MANNER OF STATING THE CONTRACT.

1. *How the Contract must be stated in general.* See tit. *Contract*
2. *What Parts of Contract must be stated.* See tit. *Contract.*
3. *What Parts of Contract need not be stated.* See tit. *Contract.*
4. *The Promise must be directly alleged.* See tit. *Contract.*
5. *Describing the Interest of the Parties.* See tit. *Contract.*
6. *Variance between the Contract stated in the Declaration and the Contract itself.* See tits. *Contract—Variance.*

(*f*) MANNER OF STATING THE CONSIDERATION.

1. *When essential to be stated.* See tit. *Contract.*
2. *What Part of, and in what Manner, to be stated in general.* See tit. *Contract.*
3. *Mode of stating it when executed.* See tit. *Contract.*
4. *Mode of stating it when executory.* See tit. *Contract.*
4. *Mode of stating it when concurrent.* See tit. *Contract.*
6. *Mode of stating it when continuing.* See tit. *Contract.*
7. *Consequences of a defective Statement.* See tits.

*Bills of Exchange and Promissory Notes,*
*Contract,*
*Exchange,*
*Executors and Administrators,*
*Forbearance,*
*Heir,*
*Landlord and Tenant,*
*Rent,*
*Use and Occupation.*

(*g*) OF ALLEGING PERFORMANCE.

1. *When Performance must be alleged.* See tit. *Contract.*
2. *In what Manner Performance must be alleged.* See tit. *Contract.*
3. *Consequences of an Averment of Performance being omitted or improperly stated.* See tit. *Contract.*
4. *Of stating an Excuse for Performance.* See tit. *Contract.*
5. *Of averring Performance in particular Actions.* See tits.

*Bail,*
*Bills of Exchange and Promissory Notes,*
*Forbearance,*
*Guarantee,*
*Landlord and Tenant,*
*Lease,*
*Marriage,*
*Principal and Surety,*
*Stock.*

(*h*) NOTICE.

1. *When an Averment of Notice is or is not necessary.* See tit. *Contract.*
2. *Consequences of an Averment of Notice being omitted or imperfectly stated.* See tit. *Contract.*

(*i*) REQUEST.

1. *When Averment of Request is necessary.* See tit. *Contract.*
2. *Statement of Time and Place.* See tit. *Contract.*
3. *Consequences of a defective Statement of a Request.* See tit. *Contract.*

(*j*) BREACH.

1. *Necessity of its being alleged, and in what Manner.* See tit. *Contract.*
2. *Alleging several Breaches.* See tit. *Contract.*
3. *Consequences of a Mis-statement.* See tit. *Contract.*

(*k*) DAMAGES. See tit. *Contract.*

A.—*IN AN INDEBITATUS ASSUMPSIT.*

(*a*) HOW CONSIDERATION TO BE STATED. See tit. *Contract.*

(*b*) MUST SHOW A CAUSE OF ACTION. See tit. *Contract.*

(*c*) MUST ALLEGE A REQUEST. See tit. *Contract.*

(*d*) MUST ALLEGE A PROMISE. See tit. *Contract.*

(*e*) HOW PROMISE IS TO BE STATED. See tit. *Contract.*

(*f*) IN PARTICULAR ACTIONS. See tits.

*Bankrupt,*
*Bills of Exchange and Promissory Notes,*
*Contract,*
*Copyhold,*
*Custom,*
*Exchange,*
*Executor and Administrator,*
*Goods bargained and sold,*
*Goods sold and delivered,*
*Insurance,*
*Interest,*
*Judgment,*
*Money had and received,*
*Money lent,*
*Money paid,*
*Rent,*
*Surgeon,*
*Tithes,*
*Tolls,*
*Use and Occupation,*
*Wager,*
*Work and Labour.*

XIII. PLEAS.

(*a*) IN DENIAL.

1. *General Issue.* See tit. *Non Assumpsit.*

2. *Nil debet, or Not guilty, improper.* See tits. *Contract—Debt, Action of—Non Assumpsit.*

3. *Promise made by Defendant and one of Plaintiffs.* See tits. *Misjoinder—Nonjoinder—Partners.*

(*b*) IN AVOIDANCE.

1. *By Common Law.* See tits.

*Alien Enemy,*
*Baron and Feme,*
*Duress,*
*Infant,*
*Intoxication,*
*Lunatic,*
*Nonjoinder.*

2. *By Statute Law.* See tits. *Bribery—Frauds, Statute of—Gaming—Usury.*

(*c*) IN EXCUSE OF PERFORMANCE. See tits. *Set-off—Tender.*

(*d*) IN DISCHARGE.

1. *By Common Law.* See tits.

*Accord and Satisfaction,*
*Account stated,*
*Alien and Alien Enemy,*
*Arbitration,*
*Attainder,*
*Composition with Creditors,*
*Foreign Attachment,*
*Judgment recovered,*
*Outlawry.*

2. *By Statute Law.* See tits.

*Bankrupt,*
*Insolvent Debtors,*
*Limitations, Statute of,*
*Requests, Court of,*
*Set-off.*

(*e*) BY AND AGAINST EXECUTORS AND ADMINISTRATORS. See tit. *Executors and Administrators.*

XIV. REPLICATIONS, REJOINDERS, &c. *are arranged under the Pleas to which they are respectively applicable.*

XV. EVIDENCE. See tits.

*Account stated,*
*Arbitration,*
*Attorney,*
*Bills of Exchange and Promissory Notes,*
*Contract,*
*Goods bargained and sold,*
*Goods sold and delivered,*
*Insurance,*
*Money had and received,*
*Money lent,*
*Money paid,*
*Non Assumpsit,*
*Stamp,*
*Use and Occupation,*
*Variance,*
*Vendor and Purchaser,*
*Warranty,*
*Witness.*

## I. WHEN IT LIES IN GENERAL*.

ANDERSON *v.* CLARK, E. T. 1824. C. P. 2 *Bing.* 20.

A qualified interest, without an absolute property, will support an action of assumpsit.

IN assumpsit, it appeared that a party having been in the habit of making shipments to the plaintiff to be sold on his account, and drawing bills on the consignee, had greatly overdrawn the account; and afterwards made a further consignment and drawn a bill of nearly the amount, which the plaintiff had refused to accept; and the defendant, the ship-owner, on being indemnified, delivered the goods to the shipper; and the jury having found that the course of dealing gave plaintiff a right to them, it was objected that assumpsit would not lie for the non-delivery of the goods.

*Per Cur.*—Although the plaintiff might not have an absolute property; yet he had a sufficient qualified interest in the goods by way of security, to entitle him to sue on a breach of contract for non-delivery.

* This action is adapted to the recovery of damages for the non-performance of a parol or simple contract; or, in other words, a contract not under seal nor of record, circumstances which distinguish this remedy from others; for the action of debt is, in legal consideration, for the recovery of a debt eo nomine and in numero, and is most frequently brought upon a deed and the action of covenant, although, in form, for the recovery of damages, can only be supported upon a contract under seal. Assumpsit is never sustainable unless there has been an express contract, or one can be implied from the nature of the transaction. Though founded upon contract, it is distinguishable from the brevia formata, and, falling within the provision of the Statute of Westminster, may be termed an action on the case. (Bac. Abr. tit. "Assumpsit"). It is now, however, called an action of assumpsit; and when the term "case" is adopted in a statute or otherwise, an action for a tort and in form ex delicto, is usually intended, and not an action in form ex contractu. (7 T. R. 36). The breach of all parol or simple contracts, whether verbal or written, or express or implied, or for the payment of money, or for the performance or omission of any other act, is remediable by action of assumpsit. (4 M. & S. 275; 3 M. & S. 191).

Before 3 & 4 Will. 4, c. 42, an action of assumpsit was, in general, the only remedy against an executor or administrator, for the breach by the testator of a contract not under seal, which was made with him for (unless in the Court of Exchequer, in which wager of law was not allowed) debt, was not sustainable against an executor, as such, upon a simple contract of his testator, although it lay against an executor on a simple contract made with him in that character. (5 Bing. 200). And, in general, assumpsit is the only remedy for the recovery of an instalment due on a simple contract, in respect of an entire sum payable by instalments, the whole of which have not accrued due as debt, is not sustainable in such case. (1 H. Bl. 547; Cro. Jac. 504). Where a simple contract creates a collateral liability, as for the payment of the debt of a third person, debt not being supportable, assumpsit is the only form of action. (Com. Dig. tit. *Debt*).

For the same reason, assumpsit is the only remedy at the suit of the payee or indorsee of a bill of exchange against the acceptor, or of the indorsee of a pro-

DOUGLAS *v.* FORREST, E. T. 1828. C. P. 1 *M. & P.* 663; S. C. 4 *Bing.* 686.

A Scotch decree may be enforced by action of assumpsit, in England.

THIS was an action of assumpsit brought by the assignees of A. and B., bankrupts, against the executor of C. D. In 1799, the testator acknowledged himself to be indebted to A. and B. in the sum of 447*l.* 6*s.* 3*d.*; and, in the same year, he acknowledged that he owed 75*l.* to B., one of the bankrupts. These debts were contracted in Scotland, of which country the deceased was a native, and in which he had a freehold estate. Shortly after the year 1799, the deceased went to India. He died in India in 1817, having never revisited Scotland. In 1802, two decrees were pronounced in the Court of Session in Scotland against the deceased, one at the instance of A. and B. and the other at the instance of B. alone. In the first of these the deceased was ordered to pay A. and B. 447*l.* 6*s.* 3*d.* with interest. In the second decree the deceased was ordered to pay B. the sum of 75*l.* with interest. It appeared from these decrees, that the deceased was out of Scotland at the time they were made; but, according to the law of Scotland, after summons, that was legal. On the question, whether an action can be maintained in England on these judgments of the Court of Session in Scotland—

*Per Cur.*—We agree with defendant's counsel that, if these decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them. But we think that these decrees are perfectly consistent with the principles of justice, otherwise we should condemn the proceedings of some of our own Courts. If a debt be contracted within the city of London, and the creditor issue a summons against the debtor, to which a return is made that the debtor has nothing within the city by which he may be summoned, or, in plainer words, has nothing by the seizure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and, unless the debtor appears within a year and a day and disputes his debt, he is for ever deprived of his property or the debt due to him. In such cases, the defendant may be in the East Indies whilst proceedings are going on against him in the Court in London, and may not know that any such proceed-

missory note against the maker. (2 B. & P. 79; 1 Taunt. 540. Sed vide Bills of Exchange and Promissory Notes). And, on an award to perform any act, except to pay money, assumpsit is the only remedy, unless the submission were by bond. (2 Saund. 62, b). Formerly, it was thought that in an action of debt on simple contract, the precise sum stated to be due in the declaration must be recovered, or that the plaintiff would be nonsuited; and, therefore, at that time, it was usual when the amount of the debt was uncertain, to declare in assumpsit; but as this notion no longer prevails, and the plaintiff will recover if he prove any sum to be due to him, though less than that stated in the declaration, it is no longer material in this respect, whether the plaintiff declare in assumpsit or debt. (1 H. Bl. 249; Doug. 6).

When a party has different securities of different descriptions for the same debt or demand, and from the same person, he must found his action on that security which is in law of the higher nature and efficacy. The law has prescribed different forms of action on different securities. Thus assumpsit cannot in general be supported when there has been an express contract, under seal, or of record, which relates to the same subject-matter, and is still in force, but the party must proceed in debt or covenant where the contract is under seal, or in debt or scire facias, if it be of record, even though the debtor, after such contract was made, expressly promised to perform it. (1 Roll. Ab. 11; 1 Leon. 293; Cro. Jac. 506; 2 Stra. 1027.

ings are instituted. Instead of the forty years, given by the Scotch law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property.

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PEATE *v.* DICKEN, M. T. 1834. Ex. 1 *C., M., & R.* 422; S. C. 5 *Tyrw.* 116; S. C. 3 *D. P. C.* 171.

To make the promise binding, there must be detriment or advantage accruing to the plaintiff.

IN assumpsit, the declaration stated that, in consideration that one C. should have credit in his accounts with the plaintiff to the amount of 150*l.*, and that one W. should stand in his place to that amount, and that the plaintiff should not personally dispute W.'s deducting that sum from certain balances due to C., defendant undertook to procure W. to execute a promissory note to plaintiff for 150*l.* On demurrer—

*Per Cur.*—This is an engagement by the defendant that, if the plaintiff will give up his claim against C., he will procure W.'s execution of the note. That is a detriment to the plaintiff. W. is to be substituted for him in the account with C., and the plaintiff might have been called upon to perform this engagement if he had refused to do so. It is no answer to say that the plaintiff might have broken his stipulation. He has agreed to release his claim against C. and to substitute W., which is a detriment to him.

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BETTS *v.* GIBBONS, M. T. 1834. K. B. 2 *Ad. & E.* 57; S. C. 4 *N. & M.* 64.

An implied promise may arise out of an express order given by the defendant.

THE defendant had employed the plaintiffs, who were carriers and wharfingers, to convey ten hogsheads of acetate of lime to N. and W., and two hogsheads had been delivered; but the remainder were still in the possession of the plaintiffs when N. and W. became bankrupts, and the defendant had, in consequence of the bills of N. and W. (which were drawn for the payment of the ten hogsheads) not being accepted, expressly ordered the plaintiffs to deliver the remainder to the order of another person, which they did; and the assignees afterwards brought an action of trover against the plaintiffs, which action, after notice to the defendant, they settled.

The Court held, that, from the order of the defendant, an implied promise arose to indemnify the plaintiffs against the consequences of acting upon it; and that they were entitled to recover from the defendant the sum which they had paid the assignees to settle the action, together with the costs.

*See Colborne* v. *Patmore*, 1 *C., M., & R.* 73.

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WESTON *v.* FOSTER, E. T. 1836. C. P. 2 *Bing. N. S.* 693.

But an implied promise does not merge in a specialty where the jury find the bond was taken as an additional security.

THE plaintiff, by his agent, advanced a considerable sum for the use of the defendant, in supplying his ship at Sierra Leone, the agent taking the captain's bills of exchange on the defendant for the amount; and subsequently, immediately before the sailing of the ship on her home voyage, the agent took a bottomry bond from the captain. The vessel being lost, and the defendant having refused to pay the amount of the bills of exchange, on the ground that the money was advanced on the security of the ship, upon action brought, the jury found, that the bond was not taken in full discharge and satisfaction of the debt, but as additional collateral security, and consequently that the defendant was liable to pay.

The Court refused to disturb the verdict, on the suggestion that the implied promise had merged in the specialty.

KING *v.* TAYLOR, E. T. 1835. Ex. 2 *C., M., & R.* 235.

Consenting to a Judge's order is not such a promise as to be made the basis of an action of assumpsit.

A PERSON was arrested whilst attending on a Judge's summons at Chambers, and an order was made by the Judge that he should be discharged, on condition that, if the officer paid him his costs he should bring no action, the Master having taxed the costs; but on an order to review it, allowed a further sum, which the officer refused to pay, and an action of assumpsit was brought, as on a promise to pay the costs, in consideration of bringing no action for arrest. It was contended, that there was in this case sufficient evidence to go to the jury of an agreement, by the defendant, to pay these costs, inasmuch as he attended the Master on taxation; and, after the Master's first taxation, he paid a part of them; and the giving up of the action was a sufficient consideration for the promise. The payment of a part of the costs was evidence of an assent on the part of the defendant to pay the balance. *Porter* v. *Cooper*, 1 C., M., & R. 387, is an authority for the plaintiff.

*Sed per Cur.*—There was no evidence of any agreement in this case. The plaintiff agreed not to bring any action if the defendant paid the costs; and a part of them only have been paid. The Judge's order has not been complied with; but there is no agreement by the defendant to pay the costs, independently of that order, on which no action can be maintained.

## V. WHEN IT SHOULD BE INDEBITATUS*, OR SPECIAL.

FALMOUTH *v.* PENROSE, H. T. 1827. K. B. 6 *B. & C.* 385.

Indebitatus assumpsit is sustainable for goods and chattels payable as toll.

INDEBITATUS assumpsit generally, for tolls of fish. It appeared in evidence that the plaintiff was entitled to certain fish, when selected, as toll. It was contended, that assumpsit in this form was maintainable. In Fitzherbert, N. B. 119, it is said, that debt would lie for twenty quarters of wheat, or for a horse, a book, a cup, or two lambs of a certain price. See Comyn's Dig. tit. *Debt*, A. 5; 4 *B. & Ad.* 268.

*Per Cur.*—Indebitatus assumpsit will lie for a chattel, but here the plaintiff has not proved the assumpsit, as he had declared upon it when the choice of the fish was made, and the declaration should therefore have been differently framed.

* An action of indebitatus assumpsit is in the nature of an action of debt, and owes its introduction, in general, to the circumstance of the defendant not being permitted, in this form of action, to wage his law. (4 Co. 91). It may be considered, as a general rule, that an indebitatus assumpsit will not lie in any case but where debt will lie. (Salk. 23). It is observable, however, that the remedy by action of debt is more extensive than the remedy by indebitatus assumpsit; for debt may be brought on a record or specialty, whereas the indebitatus assumpsit is confined to parol agreements. Hence, although the form of the general indebitatus assumpsit is very concise; yet it is essentially necessary to state in the declaration for what cause the debt or duty became payable, in order that it may appear to the Court to be matter whereon an assumpsit may be founded; and an omission in this respect may be taken advantage of by writ of error, (Cro. Jac. 206), or in arrest of judgment after verdict. (Cro. Car. 31). But it is not necessary, in this form of action, to state the particular items constituting the debt: it is sufficient if the declaration state generally that the defendant was indebted to the plaintiff for work and labour; for the agistment of cattle in the plaintiff's ground; for a premium upon a policy of assurance upon such a ship; upon an account stated on a foreign judgment, without stating the cause of action on which the judgment

DAVIS *v.* MORGAN, E. T. 1825. K. B. 4 *B. & C.* 8; S. C. 6 *D. & R.* 42.

Or where defendant has derived a benefit from the use of the plaintiff's property.

IN an action of indebitatus assumpsit for the use, occupation, and enjoyment of a certain river, stream, or water-course, and of the water running, flowing, and being therein, and of a certain wear erected, standing, and being in and across the said river, &c. and of the liberty and privilege of keeping and continuing the said wear at a certain height, to wit, the height to which the same had theretofore been raised, and of certain lands and premises, by defendant, at his request, and by permission of plaintiff, for a long time before these elapsed, had, held, used, occupied, and enjoyed. It appeared that the defendant's ancestor had formerly tortiously diverted water, to which a person, through whom plaintiff claimed, had a right, and damages had been recovered in respect thereof; whereupon a lease had been granted to him for lives, which, having expired, the defendant had continued to enjoy the benefit of it. On an objection that the action would not lie,

*Per Cur.*—As the defendant has received a benefit flowing to him by the permission of the plaintiff, we think that furnishes a good consideration to an implied promise, on which plaintiff is entitled to recover.

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SINCLAIR *v.* BOWLES, E. T. 1829. K. B. 9 *B. & C.* 92; S. C. 4 *M. & Scott*, 1.

But not where the plaintiff has not performed his part of the contract.

THE plaintiff undertook to repair an article at a stated sum, and was told by the defendant not to take it away, unless he would make it complete for that sum, and the article was brought home very imperfectly repaired.

The Court held, that the plaintiff not having performed his part of the contract, could not recover in indebitatus assumpsit, for work and labour done, and materials found.

*See Adlard* v. *Booth*, 7 *C. & P.* 108: *Roberts* v. *Horelock*, 3 *B. & Ad.* 404, *and* 9 *B. & C.* 386: 3 *Bing.* 285.

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## X. PARTIES TO THE ACTION IN GENERAL.

HEUDEBOURCK *v.* LANGTON, H. T. 1829. N. P. 3 *C. & P.* 566.

In assumpsit against two there must be evidence of liability as to each*.

IN an action for penalties against present surveyors, under 13 Geo. 3, c. 78, s. 48, by their successors, for not paying over monies in their hands, with a count also for monies had and received. It appeared that the monies collected in had only come to the hands of one of the defendants.

Lord *Tenterden*, C. J.—The count, for money had and received, could not be supported against the two, as there must be evidence of something done by each touching the receipt of the money.

proceeded; or for money had and received, without stating for what cause the money was had and received.

* And the plaintiff may proceed by steps to fix all, and the statements of each are admissible as affecting them individually. (*Whitford* v. *Tutin*, M. T. 1833, N. P., 6 C. & P. 228). Where the defence was that the credit was given to the defendant's wife's father:—Held, that evidence of other tradesmen having given such credit was not admissible. (*Tindal*, C. J.—*Smith* v. *Wilkins*, 1833, N. P., 6 C. & P. 180).

# Attachment.

I. WHEN IT LIES IN GENERAL, p. 410.

II. WHEN OBTAINABLE AGAINST PARTICULAR PERSONS, OR WHEN CONNECTED WITH PARTICULAR PROCEEDINGS. See tits.

*Arbitration,*
*Attorney,*
*Bail,*
*Body, Rule to bring in the,*
*Capias ad satisfaciendum,*
*Certiorari,*
*Commons, Member of the House of,*
*Constable,*
*Contempt of Court,*
*Coroner,*
*Corporation,*
*Costs,*
*County Palatine,*
*Ejectment,*
*Error,*
*Escape,*
*Executor and Administrator,*
*Fieri Facias,*
*Gaol and Gaoler,*
*Insolvent Debtor,*
*Interrogatories,*
*Judge's Order,*
*Jury,*
*Libel,*
*Mandamus,*
*Penal Actions,*
*Plea,*
*Prisoner,*
*Process,*
*Quo Warranto,*
*Replevin,*
*Rescue,*
*Rule of Courts,*
*Sheriff,*
*Sunday,*
*Warrant of Attorney,*
*Witness.*

III. HOW OBTAINED.

(*a*) Of the demand, p. 412.
(*b*) Preliminaries to obtain, p. 413.
(*c*) Of the affidavit, p. 413.

IV. MOTION AND RULE FOR.

(*a*) Motion for, p. 413.
(*b*) Rule for, p. 413.
(*c*) By whom moved, p. 415.
(*d*) Where heard, p. 415.

V. DISCHARGING PARTIES OUT OF CUSTODY ON, p. 415.

VI. OF ATTACHING PRISONERS, p. 417.

VII. COSTS ON, p. 417.

VIII. AFFIDAVITS CONNECTED WITH, p. 417.

## I. WHEN IT LIES IN GENERAL.

Clements *v.* Williams, H. T. 1836. C. P. 2 *Scott*, 814.

An attachment lies against a party who

On motion for an attachment, it appeared a young lady, aged seventeen, was a material and necessary witness; that she resided with the defendant as a part of his family, and was entirely under

his care and control, and that the plaintiff had been compelled to countermand the notice of trial in consequence of his inability to serve her with the subpœna, the defendant keeping her out of the way.

keeps a witness out of the way*.

*Per Cur.*—This is clearly an offence against justice, and punishable by attachment. The rule must be absolute, unless the defendant undertakes to produce the witness at the trial, and pays the costs of this motion.

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MILLER *v.* KNOX, E. T. 1838. Dom. Proc. 4 *Bing. N. S.* 574.

So, on the execution of a writ of rebellion, all persons being bound to assist if required, an attachment lies against a stranger for refusing to do so.

ON an appeal from the Court of Exchequer in Ireland to the House of Lords, on a writ of rebellion, two questions arose—1st, Have the persons named in the writ, and charged with the execution of it, a right, at their discretion, to require the assistance of any of the liege subjects of the Crown to aid and assist in the execution of the writ?

And, 2ndly—Suppose a stranger to the proceedings in the cause, but liable to be called upon to assist in the execution of a writ of rebellion, regularly called upon to render such assistance, and he declines so to do, can the Court out of which such writ issued, commit such person as guilty of a contempt of such Court?

The Judges (*Littledale*, J., and *Bosanquet*, J., dissent.) were of opinion, that if a stranger to the proceedings of the cause, being, in other respects, liable to be called upon to assist in the execution of a writ of a rebellion, has been regularly called upon to render such assistance, and refused or declined so to do, the Court out of which such writ issued may proceed against him, by attachment, for a contempt of the Court; and if no sufficient answer or excuse be shewn on his part, he may be committed for such contempt. And they said, "We ground this opinion upon the consideration that the proceeding by attachment is a legal and constitutional mode of punishing persons guilty of contempt against the authority of the superior Courts of law; and that the disobedience of the mandatory part of this writ by a person who has been duly made acquainted with its exigency, and required to assist, and has not at the time a legal excuse for refusing or declining to assist, is a denial of the authority, and therefore a contempt, of the Court."

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*In re* BARWICK, E. T. 1835. Ex. 3 *D. P. C.* 703.

And an executor who does not account pursuant to a rule of Court, is liable to an at-

A RULE had been granted against an executor to account; he omitting to do so, motion was made for an attachment. Several attempts had been made to serve him personally, but without success; and it was alleged in the affidavit that he kept out of the way to avoid being served with the rule.

* On serving a copy of a rule, the defendant snatched the original out of the officer's hand, but ultimately gave it back. The Court refused an attachment, because it did not amount to a contempt of the process. (*Williams*, J.—*Weekes* v. *Whitely*, E. T. 1835, B. C., 3 D. P. C. 536).

So, where a habeas corpus has been served on a party in France and the proceedings recognised by the French tribunals, an attachment will not be granted absolute in the first instance, if the party be in custody in France. (*Patteson*, J.—*Ex parte Wyatt*, H. T. 1836, B. C., 5 D. P. C. 389).

And where an execution was set aside, after payment of debt and costs, and it was ordered that the money so levied should be repaid with costs:—Held, that the attachment could only be obtained for sums properly paid by the defendant. (*Whalley* v. *Barnett*, E. T. 1833, B. C., 2 D. P. C. 33).

tachment, if he keeps out of the way, without personal service of the rule.

*Per Parke*, B.—You must make out a very strong case, before the Court will allow anything short of a personal service to be sufficient. The Court granted a rule nisi, which was afterwards made absolute, no cause being shewn.

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REX *v.* CORPORATION OF FOWEY, H. T. 1825. K. B. 5 *D. & R.* 614.

Personal service of a mandamus against the mayor of a corporation is not essential to ground an attachment.

A RETURN to a mandamus was to be made within six days. On motion for an attachment, it appeared that the mandamus had been served on the town-clerk, but not personally on the defendants, and there was a doubt in the Crown-office whether an attachment would lie without personal service of the mandamus.

*Per Cur.*—The attachment may issue without personal service. If the defendants wanted further time to make their return, they ought to have applied to the Court for that purpose.

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## III. HOW OBTAINED.

### (*a*) OF THE DEMAND*.

DENNETT *v.* PASS, E. T. 1835. C. P. 3 *D. P. C.* 632.

Where money is to be paid to the party or his attorney, a demand may be made by the attorney, though the agent's name be on the record.

A RULE for the payment of costs directed them to be paid to the party or his attorney. Previously to moving for an attachment, a demand was made, not by the attorney on the record, who resided in London and who was in fact the agent, but by the attorney in the country, who was really the attorney employed. On motion to set aside the attachment, on the ground that the demand should have been made by the attorney in the cause—

*Per Cur.*—The demand in this case is sufficient. It has been made by the party employed as the attorney; the other was the mere agent.

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EVANS *v.* MILLARD, E. T. 1835. Ex. 3 *D. P. C.* 661.

But where a Judge directs a tender to be made to the plaintiff to ground an attachment, a tender to his attorney will not do.

ON motion for an attachment for not obeying a Judge's order, it appeared that an order had been obtained, on the part of the defendant, whereby it was ordered that, on payment or tender of the sum of 1000*l.* and interests to the plaintiffs, their attorney, or agent, the plaintiffs should deliver up the title-deeds and securities for the debt which was the subject of the action. There had been a tender of the money to the plaintiff's attorney, but the title-deeds had not been delivered up.

*Per Alderson*, B.—You cannot have an attachment. You must give notice to the plaintiffs that you have tendered the money to their attorney, and demand the title-deeds from them personally.

* The demand may be made some weeks before the attachment is applied for. (*Rex* v. *Rogers*, E. T. 1835, B. C., 3 D. P. C. 605). On a rule to deliver up a bond to the plaintiff, his attorney, or agent—Held, that the demand could not be made by the attorney's clerk. (*Ex parte Fortescue*, H. T. 1834, B. C., 2 D. P. C. 448).

Where money is to be paid to a person not an attorney, the demand must be made by the party himself, or his agent authorized by power of attorney. (*Brown* v. *Jenks*, H. T. 1636, K. B., 4 D. P. C. 581). A demand will be dispensed with where service could not take place from apprehended violence. (*Williams*, J.—*Wenham* v. *Downes*, E. T. 1835, B. C., 3 D. P. C. 573).

CHILTON *v.* ELLIS, H. T. 1834. Ex. 2 *D. P. C.* 338.

ON motion for an attachment for non-payment of costs, it appeared that the demand had been made before the order had been made a rule of Court.

The Court refused the attachment.

The demand must be made after the order has been made a rule of Court.

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(*b*) PRELIMINARIES TO OBTAIN*.

(*c*) OF THE AFFIDAVIT†. And see tit. *Affidavit*.

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## IV. MOTION AND RULE FOR.

### (*a*) MOTION FOR.

FORSTER *v.* KIRKWALL, M. T. 1835. Ex. 4 *D. P. C.* 370.

THIS was an application to make a Judge's order, granted in vacation, a rule of Court, and also for an attachment for non-compliance therewith. It was mentioned to the Court that there was a doubt as to the practice on the subject, whether both could be moved at the same time.

*Sed per Cur.*—One rule is sufficient. The contempt was complete before the motion was made. It is not as if the contempt were perfected by making the Judge's order a rule of Court.

In the Exchequer, to make a Judge's order a rule of Court, and for an attachment, may be moved for at the same time‡.

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PILCHER *v.* WOODS, M. T. 1835. C. P. 4 *D. P. C.* 329.

MOTION to make a Judge's order a rule of Court; and also for an attachment thereon. It was stated, in support of the application, that, in the other Courts, one motion is sufficient.

*Sed per Gaselee*, J.—We shall adhere to our practice in this Court. Two motions are necessary.

Aliter, in the Common Pleas.

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### (*b*) RULE FOR.

PARKER *v.* BURGESS, H. T. 1834. K. B. 3 *Nev. & M.* 36.

MOTION for an attachment for a contempt in not obeying a rule of Court. It appeared the original rule had been shewn; but there had been no personal service of the copy of the rule. It was contended, that the rule requiring a personal service of the copy of the rule of Court had been substantially complied with by shewing the original at the time when the demand was made.

There must be personal service of a copy of the rule, merely shewing the original will not do§;

* To ground an attachment, all the necessary preliminaries must have been taken at the proper times, and the party making the demand prepared with the requisite documents. (*Williams*, J.—*Rogers* v. *Twisdel*, E. T. 1835, B. C., 3 D. P. C. 572).

† A rule of Court must not be described as an "order;" and where an affidavit for an attachment for non-payment of money so stated it, it was held bad. (*Littledale*, J.—*In re Turner*, M. T. 1837, B. C., 6 D. P. C. 6).

‡ So, in the King's Bench. (*Coleridge*, J.—*Hinchliffe*, v. *Jones*, T. T. 1835, B. C., 4 D. P. C. 86). However, in a prior case, (*Stainland* v. *Ogle*, M. T. 1834, B. C., 3 D. P. C. 99), *Williams*. J., entertained a different opinion.

§ But the original need not be placed in the party's hands. (*Taunton*, J.—*Cal-*

*Sed per Cur.*—There must be a personal service of the copy of the rule, as well as a personal demand of the money.

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GARLAND *v.* GOULDEN, H. T. 1828. Ex. 2 *Y. & J.* 89.

even where it appears the defendants "were shy and difficult to be met with;"

ON motion that service at the dwelling-house should be deemed good service of a rule for an attachment upon an affidavit, that the defendants were "shy, and difficult to be met with, and that the deponent had tried all the means in his power for two months."

*Per Cur.*—All rules which attach upon a party the consequences of contempt must be served personally, and we cannot therefore make the order.

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GREEN *v.* PROSSER, T. T. 1833. Ex. 2 *D. P. C.* 99.

but, keeping out of the way to avoid service of a rule will dispense with personal service*;

A PARTY kept out of the way to avoid being served personally with a rule preparatory to obtaining an attachment against him, which fact being made clear to the satisfaction of the Court—

The Court said, that nothing but a very strong case established to the satisfaction of the Court, could dispense with the necessity of personal service; but they thought this was such a case, and that the rule should be made absolute, the attachment to lie in the office for a fortnight.

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LOWE, *In re*, H. T. 1833. K. B. 4 *B. & Ad.* 412.

though it is indispensable, if the party has another remedy, that there be such service.

ON motion for an attachment, it appeared that the parties submitted to arbitration, and the submission was made a rule of Court. The award was against Lowe, attempts having been made, without success, to serve him with copies of the award and rule. There had been no personal service, and it appeared that the party knew it was intended, and avoided it.

*Sed per Cur.*—We are of opinion that we ought not to grant an attachment without personal service in any case where the party applying has another remedy.

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LEVI *v.* DUNCOMBE, H. T. 1835. Ex. 1 *C., M., & R.* 737; S. C. 3 *D. P. C.* 447.

Semble, If party appears on rule for an attachment coming on, he waives the want of regular service.

ON shewing cause against a rule for an attachment against an attorney, for not delivering his bill of costs pursuant to a Judge's order, which order had been made a rule of Court, they contended that without merits the rule must be discharged, as it had not been personally served upon the plaintiff but only upon his clerk.

*Sed per Cur.*—Even if personal service was requisite in this case, the effect of a party appearing who has not been regularly served, is the same as if the service had been regular. The instances are numerous, both in the case of convictions and of civil proceedings; the appearance is a waiver of the irregularity.

*vert* v. *Redfearn*, E. T. 1834, B. C., 2 D. P. C. 505). And to found an attachment for not obeying a Judge's order, the rule of Court having been served is sufficient without service of the order. (*Greenwood* v. *Dyer*, M. T. 1836, B. C., 5 D. P. C. 255).

* Though not where it appears the rule nisi was served on the defendant's son, who refused to say where his father was, or when he could be seen. (*In re Ibbertson*, T. T. 1836, B. C., 5 D. P. C. 160).

REX *v.* SHERIFF OF MIDDLESEX, M. T. 1836. Ex. 2 *M. & W.* 107.

As soon as the rule has been obtained, the attachment is deemed to have issued, and the proceedings are on the Crown side.

THE defendant was arrested in September, and in the same month the Sheriff returned cepi corpus. On the 29th of September the Sheriff went out of office. On the 5th of October a Baron's order was obtained for the Sheriff to return the writ, and a rule was subsequently obtained for an attachment against the Sheriff for disobedience thereto. On motion to set aside the attachment, on the ground that the affidavits were wrongly entitled, no attachment having been issued against the Sheriff, they ought to have been entitled in *The King* v. *The Sheriff of Middlesex*—

*Per Cur.*—It is stated in Mr. Tidd's Practice, 314, that as soon as the attachment is granted, the proceedings are on the Crown side. It is reasonable to consider the attachment to have been granted when the rule has been obtained. The Sheriff cannot know when it is sued out.

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RICHMOND *v.* BOWDITCH, H. T. 1836. Ex. 1 *M. & W.* 40; S.C. 4 *D. P. C.* 749.

The rule for an attachment is only nisi, except for non-payment of costs.*

ON motion for an attachment for not paying over the money pursuant to the order of Court, it was submitted on the authority of *King* v. *Price*, 1 Price, 341, that the rule should be absolute in the first instance—

*Parke*, B.—In *King* v. *Price* there was an order of this Court; but in this case it may be considered as the order of a Judge only; or at any rate it was not made in the manner in which this Court usually makes such orders. In matters so penal as an attachment we will not extend the authority of *King* v. *Price* in any degree; but will act on the distinction alluded to, that except for non-payment of costs the rule is nisi.

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### (*c*) BY WHOM MOVED.

FENN, *Ex parte*, T. T. 1834. K. B. 2 *D. P. C.* 527.

The motion must be made by counsel.

AN application against an attorney for an attachment for misconduct was moved by the applicant in person.

*Sed per* Lord *Denman*, C. J.—This motion is in the nature of a criminal proceeding, and must be made by counsel, so as to give a sanction, and shew that there is some ground for the application.

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### (*d*) WHERE HEARD.

FALL *v.* FALL, T. T. 1833. Ex. 2 *D. P. C.* 88.

The rule cannot be disposed of at Chambers.

ON motion for an attachment for non-payment of costs, pursuant to an award, it being near the end of the term. Application was made that it might be heard at Chambers—

But *Bailey*, B., refused it, and said it was quite unusual.

* Unless a reasonable time has intervened between serving the rule and shewing cause, the Court will order it to lie in the office a few days. (*Patteson*, J.—*Rex* v. *Giles*, H. T. 1836, B. C., 4 D. P. C. 569).

## V. DISCHARGING PARTIES OUT OF CUSTODY ON.

REGINA *v.* BURGESS, E. T. 1838. Q. B. 3 *N. & P.* 366.

A prisoner who has been arrested irregularly on an attachment, must apply for his discharge without delay.

THE defendant was taken under an attachment, which being set aside for irregularity, on the same day, 3rd of February, another writ was issued; and on the first the defendant was discharged out of custody, and was walking home, when a Sheriff's officer took him under the second attachment, and lodged him in Suffolk gaol. The defendant swore that he was on his nearest course to go home, and had not made any deviation. It was contended, that the application, not being made till the tenth day of Easter Term, was too late.

And *per Cur.*—The application is clearly out of time. The objection relied on is just of that kind which ought to be taken immediately.

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PITT *v.* COOMBS, H. T. 1834. K. B. 3 *N. & M.* 212. S. C. 5 *B. & Ad.* 1078; *but not* S. P.

Upon an attachment for non-payment of money, tendering the amount to the officer does not entitle the party to his discharge.

ON an attachment for non-payment of money, P. tendered to the officer arresting him the amount for the non-payment of which the attachment was issued; but the latter refused to accept it, assigning no reason for his refusal. The Court, upon hearing this statement, said that the matter ought to be inquired into. In arguing the rule, it was said that as to the point made respecting tender of the money it was unnecessary to offer any argument to the Court, as the arrest was upon an attachment for contempt, issued out of the Court of Chancery, which could not be purged by payment of money.

*Denman,* C. J., was of that opinion.

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REX *v.* MORLEY, E. T. 1836. K. B. 4 *A. & E.* 849.

The Master's report that the defendant has cleared himself from the contempt will not be revised by the Court, unless it appears from the interrogatories and answers he is mistaken.

ON an attachment for a contempt in not attending the trial of a cause as a witness, pursuant to a subpœna. *Littledale,* J., ordered that it should be referred to the Master to inquire whether the defendant's clerk was at Westminster at or before five minutes after ten on the morning of the day of trial; and, if he was, that the rule should be discharged; but, if the Master should find that he was not there, that the rule should be made absolute.

The Master reported that he was not, and the rule was made absolute for an attachment. On motion for the Master to review his report—

*Per Cur.*—We cannot rehear the case. We do not say that if we found that the Master was mistaken, we should not desire a review of his report; but some ground must be laid for it. If there has been a mistake, it will appear from the interrogatories and answers.

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REX *v.* CALVERT, M.T. 1833. Ex. 2 *C. & M.* 189; S. C. 2 *D. P. C.* 276; S. C. 4 *Tyrw.* 77.

But where a copy of the rule mis-spelled the defendant's name, and the

THE copy of the rule for an attachment for non-payment of money upon an allocatur, mis-spelled the defendant's name, "Calver" for "Calvert," and the Master's, "Day" for "Dax," although correct in the original. On motion to discharge the defendant—

*Per Cur.*—This copy is imperfect in two respects. It is just the same as if the allocatur had not been signed, as it purports to be signed by a person by the name of Day, who is no officer of this Court, and has nothing to do with the allowance of costs.

Master's, defendant was discharged.

## VI. OF ATTACHING PRISONERS.

BOUCHER *v.* SIMS, T. T. 1835. Ex. 2 *C., M., & R.* 392.

ON motion for an attachment against a prisoner in custody of the marshal, and that he be brought up to be charged with the attachment—

*Per Cur.*—The practice is to lodge the attachment with the sheriff, who may take the defendant upon it as soon as he is out of custody on the present process.

Where a prisoner is in custody of the marshal, the attachment should be lodged with the sheriff.

## VII. COSTS ON.

TYLER *v.* CAMPBELL, H. T. 1839. C. P. 7 *Scott*, 116.

AN attachment against the defendant was to lie in the Master's office a certain time for him to restore certain wine, or the proceeds, to P. W., the wine being alleged to have been sold; and, in the event of his doing so, the attachment to be discharged, on payment of the costs of the attachment. The defendant not complying with the conditions imposed within the time limited, the attachment was put in course of execution. The defendant subsequently paid the value of a portion of the wine, and restored the residue. The Master having, on taxing the costs, disallowed the expenses of the inquiry touching the alleged sale on the part of the plaintiff, a rule nisi was obtained for a review of the taxation.

*Per Cur.*—Costs of the attachment must include all such as are fairly incidental to the attachment; and, among others, those of the proceedings, to clear the defendant of his contempt.

All charges incidental to the attachment, and the removing of the contempt, come within the word "costs," when given on an attachment.

## VIII. AFFIDAVITS CONNECTED WITH.

REX *v.* STRETCH, T. T. 1835. K. B. 4 *D. P. C.* 30.

AFFIDAVITS in answer to application for an attachment for disobedience to a subpœna, were intituled "in the King's Bench." On an objection that they should have been intituled not in the Court, but in the cause—

*Per* Lord *Denman*, C. J.—They are properly intituled in the Court, as the record in the prosecution of "*The King* v. *Stretch*" is not in Court. Had it been, they should have been intituled in the cause.

The affidavits in answer should not be intituled in the cause, unless the record is in Court.

# Attainder*.

See tit. *Copyhold.*

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DOE *v.* PRITCHARD, M. T. 1833. K. B. 2 *N. & M.* 489; S. C. 5 *B. & Ad.* 765.

An attainted convict may, before office found, make a valid demise†;

IN an action of ejectment, on verdict, subject to the opinion of the Court, it appeared that a lease for lives of A., B. and C. and the survivors and survivor of them, with a clause of re-entry, "in case A., his heirs or assigns, should become insolvent and unable, from circumstances, to go on with the said farm," &c. had been granted. B. became entitled to the premises as special occupant, and afterwards committed felony, was convicted and attainted, but no office found; the reserved rent was afterwards paid by the mother of B. and his sister to the persons entitled to the reversion. On the death of the third life, C., the reversioner, let the premises to one D., and then brought ejectment and recovered possession; and against the defendant's tenants in possession, under a subsequent letting by

* The difference between a man attainted and convicted is, that a man is said to be convicted by verdict or confession, and when he hath his judgment upon the verdict or confession, then he is said to be attainted. (1 Inst. 390, b). That is to say, his blood is become (attinctus) tainted, stained, or corrupted, insomuch that by the common law, in cases of treason or felony, his children or other kindred cannot inherit his estate, nor his wife claim her dower, and the same cannot be restored or saved but by act of Parliament; and therefore, frequently, there is a special provision, by act of Parliament, that such or such an attainder shall not work corruption of blood, loss of dower, nor disherison of heirs. (1 Inst. 391, b).

By stat. 54 Geo. 3, c. 145, intituled "An Act to take away corruption of Blood, save in certain cases," it is enacted, "That no attainder for felony, which takes place from and after the passing of this act, save and except in the cases of the crime of high treason, or of the crimes of petit treason, or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, shall or might have appertained if no such attainder had been, to enter into the same."

The recent stat. 4 & 5 Will. 4, c. 23, alters the law as to the escheat and forfeiture of real and personal property held in trust, &c.

It should be mentioned, that a felon attainted and ordered to be transported for a certain term of years, was not (under the 8 Geo. 3, c. 15) restored to his civil rights till after the expiration of the term for which he was ordered to be transported. Therefore, as by his attainder all personal property and rights of action accruing to him (either before or after the attainder) were vested in the Crown, without office found, the attainder of such a person was held to be well pleaded to an action brought by him on a bill of exchange which had been indorsed by him after his attainder and before the term of his transportation had expired (*Bullocks* v. *Dodds*, 2 B. & A. 258). But now, by the 5 Geo. 4, c. 84, s. 26, the 8 Geo. 3, c. 15, is repealed; and though a felon may not have served the whole period of the term for which he was transported, yet, if he shall receive any remission of part of the term of his transportation from the governor or lieutenant-governor of New South Wales, or any other colony, he may now, whilst lawfully residing in any place, under such sentence or remission, lawfully sue for the recovery of any property acquired by him since his conviction, not only in the colonial Courts but in those of any part of his Majesty's dominions. (See Deacon's C. L. Dig. 83).

† But a conveyance by a party under charge of, and afterwards convicted of felony, is void against the Crown. (*Tindal*, C. J.—*Morewood* v. *Wilkes*, 1833, N. P., 6 C. & P. 144).

him, this ejectment was brought, on the ground that the lease was still subsisting with the freehold in B. The question therefore was, whether the estate of B. in the premises in question was divested out of him by his attainder and conviction without office found or entry by or on behalf the Crown.

*Per Cur.*—An estate is not divested until office found, and in the present instance, no office has been found; and, therefore, the Crown is not entitled. It is laid down in Perkins, tit. *Grant*, 26, that a man attainted of felony or murder may make a grant or feoffment, &c.; and the same is said to bind all persons but the King and the lord of whom the land is held. This passage is referred to in Comyns's Dig. tit. *Capacity*, D. 6. The same doctrine is laid down in Sheppard's Touchstone. The passage in Co. Litt. 42. b, which seems, at first sight, to be to the contrary, will be found to be consistent with those authorities; for, after stating that persons attainted of felony have no ability to enfeoff, &c., he says, the feoffments of these may be avoided.

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REX *v.* BRIDGER, H. T. 1836. Ex. 1 *M. & W.* 145.

or convey, by lease and release, an estate for life.

R. W. M. being seised of an estate for life, in Trinity Term, 1801, levied a fine with proclamations, and afterwards, on the 9th January, 1815, was convicted of bigamy, and sentenced to seven years' transportation. By lease and release of the 15th and 16th April, 1815, he conveyed his estates to G. B. during the term of his own life. On the 11th March, 1830, one J. E. obtained a judgment of outlawry against R. W. M., and afterwards sued out a capias utlagatum, on which an inquisition was taken, which found that the outlaw was seised of lands, but omitted to find what interest he had in them. A writ of melius inquirendum was sued out of this Court upon the application of the said J. E., on which the sheriff returned his seisin in fee, and that he had seized the lands into the hands of the King. The defendant appeared to traverse the inquisition, and, having set forth the conveyance to him, traversed specially the seisin in fee of the said R. W. M. at the time of the taking of the inquisition. The Attorney-General replied that he was seised, and further, the conviction before-mentioned, to which the defendant pleaded nul tiel record. The questions for the opinion of the Court were, first, whether R. W. M. was seised in fee of the premises in question, as stated in the inquisition; and secondly, if not, whether the defendant was entitled to traverse the inquisition.

*Parke*, B.—There is no issue upon it, unless you can establish that the conviction of bigamy necessarily prevents a party from conveying his lands. A mere conviction does not amount to an attainder. The Court of King's Bench held, in a late case, that a felon convict might make a lease, which could only be defeated by an actual entry, or by a commission under the Great Seal. (*Doe* v. *Pritchard*, ante, p. 418.

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BRAY PEERAGE and the CAMOYS PEERAGE, House of Lords, 1839. 8 *Scott*, 108; S. C. 5 *Bing. N. S.* 754.

Effect of attainder on the right of co-

THE following statement and questions were submitted to the Judges by the House of Lords:—During the abeyance of a barony, descendible to heirs of the body, one of the co-heirs was at-

heirs, and the power of the Crown to determine the abeyance.

tainted for treason. An act of Parliament afterwards passed to restore in blood the sons and daughters of the attainted co-heir. A. claims through the co-heir who was so attainted. B. claims through another co-heir. First question:—Is it competent for the Crown to determine the abeyance in favour of A.? Second question:—Is it competent for the Crown to determine the abeyance in favour of B.?

Held, competent in the Crown to determine the abeyance in favour either of a party claiming through the co-heir who was so attainted, or of one claiming through another co-heir.

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**Attestation.** See tits. *Deed—Will.*

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# Attorney*.

(2 *Peters. Ab.* 500.)

See tit. *Mandamus.*

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## I. OF THE CLERKSHIP AND PRELIMINARY QUALIFICATIONS.

* The word "attorney" may convey two distinct ideas: first, that of a professional agent appointed to act as the authorized representative of another; secondly, that of an attorney at law, retained to prosecute and defend for his client, and he is in that sense considered as an officer belonging to the Courts of justice. Although termed an attorney at law, he may, besides the routine of business in Court, necessarily transact and manage all matters that arise out of and are necessarily incident to the original capacity in which he was engaged, and, in pursuance of a delegation to that effect from his employer, be intrusted with the superintendence of business entirely unconnected with law, though he may apparently act quasi an attorney, and remain amenable to the jurisdiction of the Courts of which he may be a member. Similar observations apply to solicitors who are employed to undertake and carry through the various stages suits depending in Courts of Equity.

For the various definitions of the words "Attorney" and "Solicitor," see 3 Bl. Com. 25; Co. Litt. 52. a. 1 Com. Dig. 618; 1 Bac. Ab. 183; Tomlin's Dictionary, tits. *Attorney—Solicitor.*

No regulation was made as to the qualifications of attornies until the reign of Henry IV. when it was deemed expedient to direct their examination by the justices, and to vest a discretionary power in such magistrates as to their admission, and to render it necessary for them to take an oath purporting that they would faithfully discharge their duties, and especially that they would abstain from making suits "in a foreign country;" and finally, to declare "that if any such attorney should be thereafter found in any default of record or otherwise, he should forswear the Court, and never after be received to make any suit in any Court of the King." To increase the respectability of attornies and insure their practical experience, all attornies were anciently obliged to attend personally in Court at stated periods; and, in furtherance of such object, it was, by the stat. 3 Jac. 1, c. 7, enacted, "That none should from thenceforth be admitted attornies in any of the King's Courts of Record at Westminster, but such as had been brought up in the said Courts, or otherwise well practised in soliciting causes, and had been found by their dealings to be skilful and of honest dispositions." In confirmation of this statute, rules were made in both Courts that no one should be admitted an attorney unless he had served the space of five years as a clerk to some judge, serjeant-at-law, practising counsel, attorney, clerk, or officer of one of the Courts at Westminster, and had also, besides having a character untainted by vice or immorality, proved that he was possessed of sufficient legal attainments to guard his client against those claims which might have no other foundation

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2. *Assignment of*, p. 426.

(*b*) Of the service,
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(*e*) Of the admission.
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5. *Signing the Roll*, p. 436.
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(*f*) Of the certificate.
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2. *In what Time to be taken out*, p. 438.
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4. *Consequences of being improperly obtained, or not obtained at all.*
   1st. *Consequences of being improperly obtained*, p. 439.
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      1. *Of the Penalties*, p. 440.
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(*g*) Re-admission.
1. *Notice of Intention to apply for*, p. 441.

than the mere assertion of a right. To discover the competency of individuals it was then usual to nominate, annually, twelve or more able practitioners, whose business it was to interrogate such persons as should be desirous to be admitted attornies. They were first to attend the prothonotary with the testimonials of service, and then to repair to the persons appointed to examine them, and being approved, were to be presented to the Court and sworn in, unless some reasonable and just exception were stated as an objection to their eligibility. It was also necessary that attornies should be admitted and reside in or near some inn of Court or Chancery, and keep commons therein. These old rules and regulations are, in a great measure, recently revived by rules made in the respective Courts. (See post, div. (*d*) Examination, p. 428).

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2. *Of the Process*, p. 446.
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## I. OF THE CLERKSHIP AND PRELIMINARY QUALIFICATIONS.

### (*a*) Of the articles*.

* The first requisite to be complied with by a person desirous of becoming an attorney is, that he should be placed under the care and tuition of a member of the profession (who has himself been duly and legally sworn), and admitted to serve as a clerk for five years. For this purpose a contract, or articles in writing, ought to be drawn up.

*Contents of.*—The nature of the clauses introduced into such articles, and which are in general subscribed by the clerk, and a person on his behalf, are, on the one hand—that the clerk will serve his principal faithfully for the above period; that he will not injure or misapply his master's property, or whatever may be intrusted to his care, and that if he does he will make an adequate compensation; that he will keep inviolate his master's secrets, and obey and execute his reasonable commands; and that he will not abandon his service without his consent: and, on the other hand, that the master will accept the clerk; that he will, during the period of his apprenticeship, as effectually as possible, and to the utmost of his skill and ability, teach and instruct him in the practice or profession, in respect of which he has become bound; and that he will, at the expiration of the term, make such exertions as may be requisite, at the costs and charges of the clerk or his friends, to procure him to be admitted and sworn an attorney of any of his Majesty's Courts of law, or equity, that may be deemed advisable, provided he has been a faithful servant.

*Stamp on.*—A stamp duty has been imposed on all articles of clerkship. Its amount depends on the object with which they are entered into. By the general Stamp Act, a duty of 120*l.* is imposed upon the contract by means of which any person shall first be bound to serve as a clerk, with the intention of being admitted as an attorney, or solicitor, in any of his Majesty's Courts at Westminster; a duty of £60 is imposed on articles for a similar purpose, with a view to admission in any of the Courts of Great Sessions in Wales, or in the Counties Palatine, or in any Court of Record in England holding pleas, where the debt or damage shall amount to 40*s.* or upwards, not being in any of his Majesty's Superior Courts. A duty of 1*l.* 15*s.* is charged upon any counterpart or duplicate of such articles,

1. *Inrolment of**.

2. *Assignment of.*

*Ex parte* UNTHANK, M. T. 1828. C. P. 2 *M. & P.* 453.

The service even of a graduated B. A. cannot be under an assignment after the expiration of the original articles on which the assignment was founded.

A PARTY had served for two months under articles, and had then left his master, and relinquished the profession; but afterwards, and after the expiration of the original articles, caused the same articles to be assigned to another attorney, with whom he served for two years and ten months, being a bachelor of arts.

The Court said, that as the term of the original contract, or articles of service, had expired before the assignment was made; and as the assignment was not of itself a new contract of service, but merely a transfer of the old one; there was not any service under a contract within the meaning of the statute 1 & 2 Geo. 4, c. 18.

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(*b*) OF THE SERVICE.

1. *With whom*†.

2. *For what Period*‡.

*Ex parte* TAYLOR, T. T. 1825. K. B. 4 *B. & C.* 341; S. C. 6 *D. & R.* 428; S. C. 5 *B. & Ald.* 538.

To render the service of a clerk binding, it must be continued and uninterrupted.

A SURVEYOR of assessed taxes served a nominal clerkship for three years, though the duties of his office only occupied one-eighth of his time. Having lost his office, he served near three years under other articles, and was admitted on affidavit that, for different periods during the first five years, amounting in all to three years, he had served his first master. On motion to strike him off the roll, on the ground that his service for the first five years was broken, and not continuous—

*Per Cur.*—The clerk must not be sui juris during any part of his

or contract of clerkship, which are in lieu of all former duties previously imposed, as well on the articles or contract as on the amount of the premium paid with the clerk.

* The articles must be inrolled or registered within six months subsequent to their having been entered into, 34 Geo. 3, c. 14. But Acts of Indemnity are frequently passed to prevent any evil accruing to those who shall have paid the proper stamp to serve as clerk, but have omitted to inrol the contract or indenture to serve.

By 7 Geo. 4, c. 44, and 1 & 2 Geo. 4, c. 48, indemnity in cases of omission to inrol articles extends to parties who have taken degrees at the Universities. If the original articles be regular, but are lost by the agent in his office, whilst there for inrolment, a copy may be inrolled. (*Williams, J.—Ex parte Chapman*, E. T. 1835, B. C., 3 D. P. C. 562; S. P. *Ex parte Clarke*, 3 B. & A. 610).

† The service must be with a practising attorney. And by a general rule of Court, the service must be continued with the attorney with whom the contract was entered; Reg. Gen. T. T. 1791, K. B.; formerly, for the period of the whole five years, but now there is an exception as to the last year, 1 & 2 Geo. 4, c. 48; 2 & 3 Geo. 4, c. 16. Where the clerk had nearly completed his articles when the master died, and served the remainder of the time with the agent of the party to whom he was assigned:—Held sufficient. (*Littledale, J.—Ex parte Tomkins*, M. T. 1837, B. C., 6 D. P. C. 3). And where an attorney, to whom a clerk has been articled, became insane during the clerkship, the Court allowed fresh articles entered with another attorney to be inrolled. (*Williams, J.—Ex parte Darbell*, E. T. 1838, B. C., 6 D. P. C. 505). But service with a surviving partner will not do. (*Ex parte Dalton*, M. T. 1840, B. C., 9 D. P. C. 110).

‡ The 22 Geo. 2, c. 46, s. 15, requires an actual service under articles for five years. But see 1 & 2 Geo. 4, c. 48, which allows the last year to be served with a *barrister, conveyancer,* or *special pleader.*

clerkship, but at the command of his master during all that period. It is not sufficient that an articled clerk picks out times during which he served attornies under articles for five years in all; for there were other times during his clerkship when those attornies were not the paramount masters.

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*Ex parte* MATTHEWS, T. T. 1830. K. B. 1 *B. & A.* 160.

Unless occasioned by illness.

AFTER two years and a half service, the clerk was seized with severe illness, which prevented him from giving any regular application to business during the rest of the term of the articles; but he attended as his health permitted, which attendances amounted in the whole to a very considerable portion of the remainder of the term.

The Court allowed of his admission.

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*In re* ———, T. T. 1831. K. B. 2 *B. & Ad.* 766.

And an objection as to irregularity in the service of clerkship after the lapse of three years cannot be taken.

THIS was an application to strike an attorney off the roll, on the ground that the service of clerkship had not been regular. It appeared that three years and a half had elapsed since his admission.

*Per Cur.*—It is now too late. Had we been applied to a term or two after his admission, we might have interfered.

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HUBBARD, *Ex parte*, T. T. 1832. K. B. 1 *D. P. C.* 438.

And two months' absence with master's consent, and a two months' service after the articles is sufficient*.

DURING the clerkship the party was absent with his master's consent for two months, at his father's, and served two additional months after the period of his clerkship.

*Patteson*, J., held this good service.

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*Affidavit of*†.

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(*c*) JURISDICTION OF THE COURT AS TO DISPUTES BETWEEN THE ARTICLED CLERK AND THE ATTORNEY‡.

*Ex parte* GARDNER, E. T. 1834. K. B. 2 *D. P. C.* 520.

A note was given as a fee, with an understanding it was not to be negotiated for a certain time; the attorney having used the note, the Court made him take it up.

AN attorney received a promissory note from the father of a clerk articled to him as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he did negotiate it contrary to his undertaking.

*Per Taunton*, J.—The attorney having expressly undertaken not to negotiate the note until the expiration of the five years, he has committed a breach of faith in negotiating it before the end of that period. It appears to me that the Court should compel him to take it up.

* An unavoidable absence for a short period may be obviated by a service after the expiration of the five years. (*Patteson*, J.—*Ex parte Frost*, H. T. 1835, B. C., 3 D. P. C. 322).

To enable a party to practise as an attorney abroad, he may, under special circumstances, be admitted before the expiration of his articles. (*Littledale*, J. —*Ex parte Twynam*, H. T. 1840, B. C., 8 D. P. C. 293. See 4 D. P. C. 88; 4 Ad. & E. 779).

† By 22 Geo. 2, c. 46, s. 4, every articled clerk shall, within three months next after the date of such articles, cause an affidavit to be made and duly sworn of its actual execution. The affidavit of the execution of several articles of clerkship must be filed within three months, under the 22 Geo. 2, c. 45, s. 9. (*Patteson*, J. —*Ex parte Joy*, H. T. 1835, B. C., 3 D. P. C. 342).

‡ Where an attorney absconds, the Court will discharge the clerk from his articles. (*Ex parte Wilkinson*, H. T. 1841, B. C., 9 D. P. C. 320).

*Ex parte* Bayley, T. T. 1829. K. B. 9 *B. & C.* 691; S. C. 4 *M. & R.* 603.

So, upon the death of one of several partners, the Court ordered a portion of the premium paid by an articled clerk to be refunded by the survivors, as they could not keep him.

The partner to whom the clerk had been articled, and premium paid, but applied to the partnership account, and who acted for the partnership, died two months afterwards. On motion that the surviving partner refund part of the premium—

*Per Cur.*—This clerk was bound to one only in name, but in reality and in conscience he was bound to the two. He was to be instructed by the two, who were in partnership together, and they caused him to be bound to one, instead of binding him to the two, in order to satisfy the act of Parliament, and enable the partners to have that number of clerks which they could not otherwise have had if the clerk had been bound to the two, instead of one of them. In conscience, it appears to us to be a binding to the two. The premium was paid to the two; and the one being dead, and the other having the full number of clerks, which the law allows him, and not being able to retain this young man, we must order the surviving partner to refund a portion of the premium.

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### (*d*) Examination*.

The Examiners' Case, M. T. 1838. C. P. 5 *Bing. N. S.* 70; S. C. 7 *D. P. C.* 156; S. C. 6 *Scott*, 782, *by name Ex parte* Masterman.

A doubt whether an articled clerk has duly

The examiners, entertaining a doubt whether an articled clerk had duly served, refused to examine him. On motion for that purpose—

* By Rule H. T. 6 Will. 4.—After reciting that, by the stat. 4 Hen. 4, c. 18, it was enacted, "That all the attornies shall be examined by the Justices, and by their discretion their names put on the roll; and they that be good and virtuous, and of good fame, shall be received, and sworn well and truly to serve in their offices." And whereas, by the stat. 3 Jac. 1, c. 7, s. 2, it was enacted, "That none shall from henceforth be admitted attornies in any of the King's Courts of Record but such as have been brought up in the same Courts, or otherwise well practised in the soliciting of causes, and have been found by their dealings to be skilful and of honest disposition, and that none be suffered to solicit any cause or causes in any of the Courts aforesaid, but only such as are known to be men of sufficient and honest disposition." And whereas, by a rule made in Michaelmas Term 1654, in the Courts of King's Bench and Common Pleas, it was ordered, that the Courts should once in every year, in Michaelmas Term, nominate twelve or more able and credible practicers, to continue for the ensuing year, to examine such persons as should desire to be admitted attornies, and appoint convenient times and places for the examination; and the persons desiring to be admitted were first to attend with their proofs of service, there to repair to the persons appointed to examine, and being approved to be presented to the Court and sworn. And whereas, by the stat. 2 Geo. 2, c. 23, s. 2, it was enacted, "That the Judges, or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath, to examine and inquire, by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney; and if such Judge or Judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Courts respectively should, and they were thereby authorized to, administer to such person the oath hereinafter directed to be taken by attornies, and, after such oath taken, to cause him to be admitted an attorney of such Court respectively." And whereas, in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges, in manner hereinafter mentioned. It is ordered, that the several Masters and prothonotaries for the time being, of the Courts of King's Bench, Common Pleas, and Exchequer, re-

*Per Cur.*—The examiners ought to examine him de bene esse, and the question as to the sufficiency of the service may then be served, is no ground for re-

spectively, together with twelve attornies or solicitors, be appointed by a rule of Court in Easter Term in every year, to be examiners for one year, any five of whom (one whereof to be one of the said Masters or prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next Easter Term, subject to such appeal as hereinafter mentioned, no person shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners, actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney, such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a Judge.

2nd.—It is further ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

3rd.—And, it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the clerk of the Lord Chief Justice of the Court of King's Bench, upon which no fee or gratuity shall be received, which application shall be heard in Serjeants' Inn Hall, by not less than three of the Judges.

4th.—And whereas the hall or building of the Incorporated Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examination, and the said Society have consented to allow the same to be used for that purpose. It is further ordered, that, until further order, such examinations be there held on such days, being within the last ten days of every term, as the said examiners or any five of them shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said Society, at their said hall, which notice shall also state his place or places of residence, or service, for the last preceding twelve months; and, in case of application to be admitted on a refusal of the certificate, shall give ten days' notice to be served in like manner of the day appointed for hearing the same.

And by Rule E. T., 6 Will. 4, for the examination of persons applying to be admitted as attornies of the Courts of King's Bench, Common Pleas, or Exchequer, pursuant to the rule of Court made in Hilary Term 1836. Whereas, by a rule of the Courts of King's Bench, Common Pleas, and Exchequer, made in Hilary Term 1836, it was ordered that the several Masters and prothonotaries for the time being of the said Courts respectively, together with twelve attornies or solicitors, should be appointed by a rule of Court in Easter Term, in every year, to be examiners for one year, of persons applying to be admitted attornies of the said Courts, any five of whom (one whereof to be one of the said masters or prothonotaries) should be competent to conduct the examination; and that, from and after the last day of the present Easter Term, subject to such appeal as thereinafter mentioned, no person should be admitted to be sworn an attorney of any of the said Courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney, such certificate to be in force only to the end of the term next following the date thereof, unless such time should be specially extended by the order of a Judge. And it was further ordered that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the Judges; and that until further order such examinations should be held in the hall or building of the Incorporated Law Society of the United Kingdom, in Chancery Lane, on such days (being within the last ten days of every term) as the said examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three Courts, and desirous of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the secretary of the said Society, at their said hall.

And whereas, by a rule of all the said Courts, made in this present Easter Term, it was ordered that the several Masters and prothonotaries for the time being of the said Courts respectively, together with Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme,

fusing his examination*.

raised; as, upon their refusal to grant him a certificate, the applicant may appeal to the Judges.

William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White, and Edward Archer Wilde, gentlemen, attornies, should be and the same were thereby appointed examiners for one year then next ensuing, to examine all such persons as should desire to be admitted attornies of all or either of the said Courts, from and after the last day of that term; and that any five of the said examiners, one of them being one of the said Masters or prothonotaries, should be competent to conduct the said examination, in pursuance of and subject to the provisions of the said Rule in Hilary Term last. In pursuance of the said rules, the following regulations for conducting the said examinations have been submitted to and approved by the Judges of the said Courts.

1. That every person applying to be admitted an attorney of any of the said Courts, pursuant to the said rules, shall, within the first seven days of the term in which he is desirous of being admitted, leave or cause to be left, with the secretary of the said Incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attornies with whom he shall have served his clerkship.

2. That, in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

3. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said Society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same; and shall also, if required, procure the attorney or attornies, with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any question touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

4. That every person so applying shall also attend the said examiners at the hall of the said Society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching the fitness and capacity to act as an attorney.

5. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters or prothonotaries) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners present, or the major part of them, shall certify the same under their hands in the following form; viz.—

"In pursuance of the rules made in Hilary and Easter Terms, 1836, of the Courts of King's Bench, Common Pleas, and Exchequer, we, being the major part of the examiners actually present at and conducting the examination of A. B., of &c., do hereby certify that we have examined the said A. B., as required by the said rules; and we do testify that the said A. B. is fit and capable to act as an attorney of the said Courts."

Questions as to due service, to be answered by the clerk:—

1. "What was your age on the day of the date of your articles?

2. "Have you served the whole term of your articles at the office where the attorney or attornies to whom you were articled or assigned carried on his or their business? and if not, state the reason.

3. "Have you, at any time during the term of your articles, been absent without the permission of the attorney or attornies to whom you were articled or assigned? and if so, state the length and occasions of such absence?

4. "Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional em-

* Where an articled clerk was prevented from quite completing his five years through the death of his master, he was allowed to be examined, on the ground that if any delay took place he would lose a valuable partnership. (*Coleridge*, C. J.—*Ex parte Fulcher*, T. T. 1840, B. C., 8 D. P. C. 614). So, an infant was allowed to be examined on the same ground. (*Ex parte Tibbs*, M. T. 1840, B. C., 9 D. P. C. 151).

## Anon., M. T. 1838. Q. B. 8 *Ad. & E.* 745; S. C. 1 *P. & D.* 71, *by name of Ex parte* Henry.

The applicant applied for an order to compel the examiners to re-examine him. It appeared that he had already, upon giving due notice and complying with the other requisites, undergone an examination, but had failed to obtain a certificate of fitness, the examiners not being satisfied as to his knowledge, that he considered himself now capable of satisfying the examiners, but that he had not given a fresh term's notice.

A party who has been examined*, but does not obtain his certificate of fitness, cannot be re-examined without new notices.

ployment as clerk to the attorney or attornies to whom you were articled or assigned?

5. " Have you, since the expiration of your articles, been engaged and concerned, and for how long time, in any and what profession, trade, business, or employment other than the profession of an attorney or solicitor?"

Questions as to due service, to be answered by the attorney:—

1. " Has A. B. served the whole term of his articles at the office where you carry on your business? and if not, state the reason.

2. " Has the said A. B., at any time during the time of his articles, been absent without your permission? and if so, state the length and occasions of such absence.

3. " Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment other than his professional employment as your articled clerk?

4. " Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5. " Has the said A. B., during the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor?"

" And I do hereby certify, that the said A. B. hath duly and faithfully served under his articles of clerkship, (or assignment, as the case may be), bearing date &c., for the term therein expressed, and that he is a fit and proper person to be admitted an attorney."

The articles of clerkship and answers to questions touching the due service and good conduct of persons applying to be admitted attornies, are to be left with the secretary of the Incorporated Law Society, at the hall in Chancery Lane, within the first seven days of term.

* A clerk, under twenty-one, cannot be examined with a view to his admission when of full age. (*Patteson*, J.—*Ex parte Cragg*, H. T. 1838, 6 D. P. C. 256). Nor can he, before the five years' service has elapsed. (*Coleridge*, J.—*Ex parte Bartlett*, T. T. 1839, B. C., 7 D. P. C. 699). Although the articles expire on the day after the time fixed for depositing them with the examiners, under E. T. 6 Will. 4, the Court will order them to be received. (*Coleridge*, J.—*Ex parte Cooper*, T. T. 1837, B. C., 5 D. P. C. 703). Where the agent of the applicant had, through ignorance, omitted to send in the answers to the examiners, the Court held it no excuse for not complying with the rule; but allowed them to be sent in on the agent paying the costs of the application. (*Coleridge*, J.—*Ex parte Holland*, T. T. 1837, B. C., 5 D. P. C. 681). Where the delay, on the part of an articled clerk, in sending in the answers required by Reg. Gen. E. T., 6 Will. 4, has been caused by the unexpected absence of the attorney with whom the articles were served, the Court will allow them to be sent in, nunc pro tunc. (*Williams*, J.—*Ex parte Lyons*, E. T. 1838, B. C., 6 D. P. C. 517). The certificate for admission may be entered at the Master's office, nunc pro tunc. (*Littledale*, J.—*Ex parte Graddon*, M. T. 1837, B. C., 6 D. P. C. 5). Where an attorney of the Court of Common Pleas of Durham applies for admission into the superior Courts at Westminster, the Court will not relieve him from undergoing the examination required by the new rules; but in case of not passing examination, he must make a subsequent application. (*Williams*, J.—*Ex parte Marshall*, E. T. 1839, B. C., 7 D. P. C. 621).

Where an articled clerk, in consequence of extreme illness at the time of his examination, has been unable to obtain his certificate, the Court will allow him to go again before the examiners without the usual notices. (*Patteson*, J.—*Ex parte Grimstone*, H. T. 1840, B. C., 8 D. P. C. 304).

*Per Cur.*—There is no doubt there must be a new notice of a full term.

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*In re* Examiners of Attornies, H. T. 1339. Q. B. 9 *Ad. & E.* 728.

But, under particular circumstances, the Court will allow a party who has failed in his examination to be re-examined in the following term, and then admitted without the term's notice.

This was an application for leave to be admitted in next term without giving the usual notices. The party had been before the examiners and had failed to obtain a certificate. The examiners were willing to examine him again, under the sanction of the Court, to enable him to complete an arrangement he had made for a partnership in the colonies, and which would be entirely defeated if a term's delay ensued.

The Court made the order.

*See* 8 *Ad. & E.* 245.

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### (*e*) Of the admission.

#### 1. *Notice of Intention to apply for*.*

*Ex parte* Lambert, T. T. 1829. C. P. 3 *M. & P.* 269.

Notice of admission left at Judge's chambers of King's Bench instead of Common Pleas, held immaterial†.

It appeared, by affidavit, that the notice of the application to be admitted had been left, by mistake, at the chambers of a Judge of King's Bench, instead of at those of a Judge of the Common Pleas; but all other requisites had been complied with.

The Court allowed the admission.

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*Ex parte* Jones, T. T. 1832. K. B. 1 *D. P. C.* 439—S. P. *Ex parte* Dobson, T. T. 1834. K. B. 2 *D. P. C.* 539.

An articled clerk assigned and then re-assigned:—Held, that the notice of admission must contain the name of the assignee.

During the five years, a clerk is assigned for a certain period, and, at its conclusion, re-assigned to his original master. The name of the assignee was not stated in the notice of the clerk's intention to apply for admission.

*Patteson*, J., said he had consulted the Judges, and that the name of such assignee ought to be stated in the notice for admission.

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*Reg. Gen.* H. T. 1840. Ex. 6 *M. & W.* 1.

In the Exchequer, the notice of admis-

It is ordered, that every person who shall intend to apply for admission as an attorney of this Court, and who shall not have been admitted an attorney and solicitor of any other Court, shall, (in

* The party should apply for admission in the term for which he has given notice, as the notice will not do for a subsequent term. (*Littledale*, J.—*Ex parte Southern*, M. T. 1837, B. C., 6 D. P. C. 26).

† And where the omission to make the entries in the books of the puisne Judges was through the mistake of the agent, the Court ordered their insertion by altering the notice to the last day of term; (*Littledale*, J.—*Ex parte Woolright*, M. T. 1835, B. C., 4 D. P. C. 274); but it must be positively shewn that his notice has been regularly put up in the King's Bench Office. (*Littledale*, J.—*Ex parte Morgan*, M. T. 1835, B. C., 4 D. P. C. 296). Where an articled clerk's Christian name has been incorrectly stated in the notice for admission, the Court will allow the notice to be corrected. (*Williams*, J.—*Ex parte Dukes*, E. T. 1839, B. C., 7 D. P. C. 605).

addition to the notices to be given to the examiners, masters, &c., as required by a rule of Hilary Term, 6 Will. 4, 1836, read in all the Courts), for the space of one full term previous to the term in which he shall apply to be admitted, cause his name and place or places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articled, written in legible characters, to be affixed in the Exchequer Office of Pleas, in such place as public notices are usually fixed; and also enter, or cause to be entered, in two books to be kept for the purpose, one at the Chambers of the said Chief Baron, and the other at the Chambers of the other Barons of this Court, his name and place or places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attornies to whom he shall have been articled.

sion must state where the party applying for his admission has lived for the last twelve months, and also the name and place of abode of the party to whom he was articled.

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*In re* Parsons, T. T. 1835, K. B. 5 *N. & M.* 241; S. C. 3 *Ad. & E.* 74, n.

On motion to admit an attorney, it appeared a notice had been given, in Hilary Term, of an intention to apply for admission in Michaelmas; and, subsequently, a notice had been given on the second or third day of Trinity Term to apply for admission at the end of that term.

Admission refused on last day of term, where the notice had been put up on the third day of the term.

*Per Cur.*—Perhaps we have gone too far already in the relaxation of the rule of Court, requiring notice to be given a whole term previous to the application to be admitted. We are not, at all events, willing to carry it any further, which we should do were we to hold the notice sufficient in the present case.

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*Ex parte* Gordon, H. T. 1834. K. B. 2 *D. P. C.* 470.

On motion to admit an attorney, it appeared that notice of his intention to apply for admission had not been stuck up in the King's Bench Office and outside of the Court until the first day of the term in which he applied for admission; but it had been done before the sitting of the Court.

So, where a notice stuck up at the opening of the office on the first day of the term on which he applied*.

*Park*, J., said, "The words of the rule of T. T. 33 Geo. 3, require a full term's notice for admission in the following term. In the case of a re-admission, the attorney has already been admitted; and as it has thereby appeared that he is a fit person to be admitted, there may be a reason for relaxing the rule in his favour."

After taking time to consider, and consulting, the Judges refused the admission.

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*Ex parte* Hancock, E. T. 1836. K. B. 4 *Ad. & E.* 779.

On motion to admit without a full term's notice, it appeared that the applicant had served his time under articles; that he had intended to leave England about the end of next Trinity Term, for the purpose of practising as an attorney in the superior Courts at

A full term's notice will be dispensed with where the party wishes to sail

* And notice posted up on the last day of term, to apply on the first day of the next term, is insufficient. (*Coleridge*, J.—*Ex parte Cross*, T. T. 1835, B. C., 4 D. P. C. 18); unless severe illness be shewn. (*Taunton*, J.—*Ex parte Herbert*, T. T. 1833, B. C., 2 D. P. C. 172).

for India sooner*.

Bombay; for which purpose it was essential that he should be admitted in a superior Court in this country. Notices had been affixed at the King's Bench Office, at the Judge's Chambers, and on the outside of the Court, and had been left with the secretary of the Incorporated Law Society, stating the usual particulars, and also the intention to make this application. The application was made on the second day of the term, and the admission was ordered to be on the last day of the same term.

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*In re* PRANGLEY, E. T. 1836. K. B. 4 *Ad. & E.* 781; S. C. 6 *N. & M.* 421.

In future, the three days' notice of admission must be delivered at the Master's office before the commencement of the term†.

P. HAD given notice, on the 12th April, of his intention to apply for admission in the next term. Term began on the 15th; and the Master doubting whether the rule of Hilary, 6 Will. 4, s. 5, which requires three days before the commencement of the term, had been complied with, the Court were applied to on the first day of term.

The Court held, that, in the present case, the notice should be deemed sufficient; but that, in future, there must be three clear days, at the least, between the day on which the notice was given and the first day of the term to which it refers.

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2. *Motion for.*

*Ex parte* SMITH, M. T. 1825. K. B. 6 *D. & R.* 382.

An affidavit, sworn in term, to admit an attorney was mislaid:—The Court, under 3 & 4 Geo. 4, enabling them to sit out of term, admitted him.

THE 3 & 4 Geo. 4 enables the Court to determine, out of term, matters depending in the Court for the despatch of business. During such sittings the applicant, an attorney, moved to be re-admitted. It appeared that he had been prevented by the affidavit (sworn in term) having been mislaid.

The Court held it was within their jurisdiction, as the statute, which was passed for the benefit of the public, must be construed liberally.

* Or, to practise abroad. (*Coleridge*, J.—*Ex parte Hulme*, T. T. 1835, B. C., 4 D. P. C. 88).

† By rule H. T. 6 Will. 4, it is ordered, that three days, at the least, before the commencement of the term next preceding that in which any person not before admitted, shall propose to be admitted an attorney of any of the Courts, he shall cause to be delivered at the Master's or Prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode, or service, for the last preceding twelve months; and the Master or Prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned, into an alphabetical table or tables under convenient heads, and affix the same on the first day of term in some conspicuous place within or near to and on the outside of each Court.

‡ Under this rule, Sunday is counted as one of the three days. (*Coleridge*, J.—*Ex parte Bumps*, T. T. 1837, B. C., 5 D. P. C, 713). But where the clerk's name was omitted to be inserted in the Master's list, under special circumstances, although the three days' notice had not been given, under rule H. T. 6 Will. 4, the Court allowed it to be introduced on the first day of term. (*Littledale*, J.—*Ex parte Blunt*, M. T. 1836, B. C., 5 D. P. C. 231).

The 15th April, which, by 11 Geo. 4 & 1 Will. 4, c. 70, s. 6, is constituted the first day of Easter Term, that day falling on Easter Sunday, a delivery three days before the 18th April of the notices for the admission was held to be a sufficient compliance with Reg. Gen. H. T. 2 Will. 4. (*Williams*, J.—*Ex parte Bayley*, E. T. 1838, B. C., 6 D. P. C. 516).

3. *In what name.*

*In re* CLARKE, E. T. 1835. K. B. 3 *A. & E.* 72; S. C. 4 *N. & M.* 709.

ON motion to amend notices with the view to the applicant's admission, it appeared that the clerk of an attorney in the country gave directions for putting up and entering his notices, pursuant to the rule Trinity 31 G. 3, before Hilary Term 1835, in order to his being admitted an attorney, in Easter Term following. The person employed gave notices, which were in all respects regular, except that they named the wrong person as the attorney to whom the clerk had been articled.

A misnomer in the notice may be amended*.

On affidavit that the inaccuracy proceeded wholly from mistake and inadvertence, the Court allowed the notices to be amended in Easter Term, and the party to be admitted in the term following.

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*Ex parte*, CROFT, T. T. 1835. K. B. 5 *N. & M.* 58.

A PARTY was articled in the name of G. C. with a person in the name of E. S., and the notice of application to be admitted was in the name of G. A. C., and stated the service to have been with E. W. S.

So, a misnomer of the Christian name in the articles, if correct in the notice, will do, on an affidavit of identity.

An affidavit was produced now before the Court, identifying the parties mentioned in the articles with those specified in the notice, and also stating that the names, as stated in the notice, were the right names.

The Court granted the application.

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*Ex parte* RIDLEY, E. T. 1836. K. B. 4 *A. & E.* 780; S. C. 6 *N. & M.* 436.

ON motion to admit an attorney, it appeared that he had served under his articles in a different name, which, in May 1835, he had changed to that of Ridley, by which he had since been known. He had fixed up his notices under the name of Ridley without reference to his former name. It was contended that this was a sufficient compliance with the rule Trin. 31 Geo. 3.

But, where a party has only changed his name shortly before applying for admission, notice in both names must be put up until the end of the term.

But the Court held, that the party must fix up notices stating both names to remain during the residue of this term; and, if no caveat was then entered, he might be admitted at the end of the term.

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*Ex parte* HAYWARD, H. T. 1838. C. P. 5 *Scott*, 712; S. C. *by name of Ex parte* WARE, 6 *D. P. C.* 463.

ON motion that an attorney who had assumed an additional name by royal licence might be so described on the roll—

Where an attorney takes an additional name by royal licence, the Common Pleas refused to allow it to be added on the roll†.

*Per Cur.*—We shall not grant his application. There is no necessity for the alteration; it is mere matter of fancy.

* But the notice of admission ought to be accurate as to the names of all the parties with whom the clerkship has been served; a wrong name being a fatal objection. (*Patteson*, J.—*Ex parte Dobson*, T. T. 1834, B. C., 2 D. P. C. 539). An omission, however, of the name of one of the parties with whom the clerk served may be amended. (*Williams*, J.—*Collins, Ex parte*, E. T. 1838, B. C., 6 D. P. C. 495).

† However, *Patteson*, J., in the Bail Court, allowed it. (*Ex parte, Ware*, H. T. 1838, B. C., 6 D. P. C. 311).

### 4. *In what Court*.*

*Ex parte* PARRY, E. T. 1836. Ex. 1 *M. & W.* 295; S. C. 5 *D. P. C.* 81.

Admission, or readmission, is a matter of course where previously admitted or readmitted in another Court.

ON motion to admit an attorney, it appeared he had been duly admitted an attorney of the Court of King's Bench, and the only question was, whether it was necessary that he should have affixed the notices in this Court, which he had not done.

*Per Cur.*—As the present application is made simply on the ground of the admission in the King's Bench, it may be granted.

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### 5. *Signing the Roll.*

HUMPHREYS *v.* HARVEY, T. T. 1834. C. P. 1 *Bing. N. S.* 62; S. C. 4 *M. & Scott,* 500; S. C. 2 *D. P. C.* 827.

To render the admission effective he must not only sign the oath-roll, but be inrolled.

THE attorney in this case had signed the roll on which attornies enter their names when they are sworn in Court, and also the parchment instrument by which a Judge authorised his admission; but he had never taken this instrument to the clerk of the warrants, in order to his name being inrolled in that officer's book.

*Per Cur.*—Signing the oath-roll alone will not suffice, as that roll is not, strictly speaking, the roll of attornies. The inrolment required by the statute was formerly entered on rolls of parchment; and now in a book, alphabetically, by the clerk of the warrants. If there were no such document to refer to, how could the Court, when called on, strike an attorney off the roll? The admission is incomplete without.

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### 6. *After practising at the Great Sessions in Wales or Pleas at Lancaster.*

READ, *Ex parte,* E. T. 1831. K. B. 1 *B. & Ad.* 957—S. P. *Ex parte* GARRATT, H. T. 1834. Ex. 2 *C. & M.* 410; S. C. 2 *D. P. C.* 371.

An admission without practising in the Great Sessions in Wales, does

THE applicant had been inrolled in, but had never taken out his certificate, though he had been admitted to practise in the Courts of Great Sessions in Wales.

On motion that he be admitted on payment of a nominal sum,

* By sect. 10, 11 Geo. 4 & 1 Will. 4, c. 70, it is enacted, "That all persons admitted, or admissible, to practise as attornies in the Courts of King's Bench and Common Pleas, shall be admissible in like manner as the attornies in the Court of Exchequer, and be admitted and allowed to practise there as such upon application to the Barons of that Court, without being obliged to employ any clerk in Court, in the capacity of attorney of the Court of Exchequer, any law or usage to the contrary notwithstanding; and that it shall be lawful for the barons of the Court, and they are hereby required to distinguish, by their rules and orders, the fees which shall continue to be taken, by the sworn and side clerks of the Court, for the duties performed as officers of the Court, similar to the duties of the officers of the other superior Courts, from such costs, fees, and charges, as shall be allowed to be taken by the attornies so admitted to practise, so that the amount of such fees and charges upon the whole do not exceed the amount and rate of such fees and charges as are now allowed upon the taxation of costs;" and by 1 & 2 Vict., attornies admitted in one Court are allowed to practise in any other, on merely entering their names on the roll of such Court.

pursuant to the act, 11 Geo. 4 & 1 Will. 4, c. 70, s. 16, in order that he might be allowed to practise in this Court as an attorney in actions brought against persons residing in Wales—

The Court held, that as this gentleman, though admitted, had not been practising in the Courts of Great Sessions, they had no power.

not authorize an admission into the King's Bench, under the 16th section, 11 Geo. 4 & 1 Will. 4.

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*Ex parte* Williams, T. T. 1836. K. B. 5 *Ad. & E.* 140; S. C. 5 *D. P. C.* 236.

Before the 11 Geo. 4 & 1 Will. 4, c. 70, the applicant had been admitted an attorney of the Court of Great Sessions in Wales, having paid the higher duty on his articles of clerkship, under stat. 55 Geo. 3, c. 184. He now applied that he might be admitted in the Court without examination. It was urged, that the application rests on the general power and discretion of this Court to admit an attorney who has paid the higher duty, qualifying him to practise in the superior Courts.

*Per Cur.*—The admission in the Welsh Courts, in 1821, was tantamount to admission in a Court of Westminster Hall, (for the abolition of the Welsh judicature ought not to operate hardly on parties), in which case the party would be admitted an attorney of this Court, as matter of course.

But a party who has been admitted in the Court of Great Sessions in Wales before that stat., having paid the higher rate of duty on his articles, may be admitted in the King's Bench without examination:

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*Ex parte* Blackhurst, T. T. 1840. Ex. 6 *M. & W.* 693; S. C. 8 *D. P. C.* 770.

On motion to admit an attorney into this Court, it appeared that he had, before rule E. T. 6 Will. 4, been admitted into, and practised at, the Court of Common Pleas of Lancaster. It was contended, that, under the circumstances, he was entitled to his admission without examination and the usual notices.

*Sed per* Lord *Abinger*, C. B.—We cannot grant the application. The rule is clear and express. The applicant must be examined, and give the usual notices, before he can be admitted into the superior Courts.

although an admission in the Court of Common Pleas of Lancaster, before rule E. T. 6 Will. 4, does not entitle an attorney to be admitted in the superior Courts without examination.

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### 7. *Fees on**.

* By rule M. T. 1838, reciting that it is provided by the act of 1 & 2 Vict. c. 45, s. 3, "That after the 1st of November, 1838, any person entitled to be admitted an attorney of any of the superior Courts of Common Law at Westminster, shall, after being sworn in and admitted as an attorney of any one of the said Courts, upon signing the roll of such Court, and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such Court, provided that no additional fee, besides those payable under an act of 1 Vict. c. 56, shall be demanded or paid, and that the fees payable for such admissions shall be apportioned in such manner as the Judges of the said Courts, or any eight of them, shall, by any rule or order made, in Term or Vacation, direct and appoint. We therefore direct and appoint that the fees, payable by virtue of the said last-mentioned act for the Judge's fiat, be received, in the first instance, by the clerk of the Judge granting the fiat, and paid over by him to the clerk of the Chief Justice, or Chief Baron of the Court, as the case may be; and, the day after each term, all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each Judge; and further, that the fees payable by virtue of the said act, to the ushers, shall be received, in the first instance, by one of the ushers of the Court in which the admission shall take place, and shall, on the day after each term, be divided into three equal portions, one of which shall be paid to the ushers of each Court. (5 B. N. S. 160; S. R. 8 Ad. & E. 741).

### (*f*) Of the certificate.

#### 1. *Entry and filing of.*

Nixon *v.* Hewitt, E. T. 1825. C. P. 10 *Moore*, 270.

A certificate filed by mistake in a Court to which an attorney is not admitted, is not sufficient to found a writ of privilege*.

An attorney's certificate was filed, by his agent's mistake, in the Court of King's Bench instead of this Court. He had not been admitted in the former Court, and the plaintiff sued him for a debt in an inferior Court, on which he sued out his writ of privilege. On motion that the writ be quashed and a procedendo issued—

*Per Cur.*—The stat. 37 Geo. 3, c. 90, s. 27, requires every certificate to be entered in one of the Courts in which the persons therein described shall be admitted, and inrolled with the respective officers of such Court within the time therein prescribed. The plaintiff, therefore, not finding the defendant's certificate in this Court, where it ought to have been inrolled, was led to believe that he was not an attorney. If it had been inrolled here, as it ought, the plaintiff would have acted differently; but, as the defendant must be responsible for the acts of his agent, and as it is not denied that a debt is due from him to the plaintiff, the Court will not assist him.

*See Eyre* v. *Shelley*, 6 *M. & W.* 269; *S. C.* 8 *D. P. C.* 185.

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#### 2. *In what Time to be taken out.*

Wilton *v.* Chambers, M. T. 1837. K. B. 2 *N. & P.* 392; S. C. 7 *A. & E.* 524.

An attorney, on re-admission, must take out his certificate within the year, though he does not practise.

On motion to set aside a judgment obtained by the plaintiff, an attorney, for business done; he appeared to have been admitted and to have taken out his certificate until 1820, when he ceased to do so; and, in 1823, obtained a rule for his re-admission, but omitted to take out his certificate for three years, although in that time it was sworn he had not practised—

The Court held, that upon the construction of 37 Geo. 3, c. 90, s. 31, and uniform practice in respect of it, he was bound, on such re-admission, to have taken out his certificate forthwith, or, at all events, within the year; and that not having done so, his re-admission became null and void, and that he could not avail himself of the judgment and securities obtained for business done in the character of an attorney during that period,

*See Bowler* v. *Brown*, 4 *N. & M.* 17; *S. C.* 3 *D. P. C.* 80.

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#### 3. *When Leave to take out is essential.*

Young *v.* Dowlman, H. T. 1829. Ex. 3 *Y. & J.* 24.

An attorney who has omitted

The defendant's attorney had been struck off the rolls in the King's Bench and Common Pleas, and had omitted to take out his

* Where the certificate has been properly taken out, but through the negligence of a clerk, is not entered in the Master's book, it may be entered nunc pro tunc. (*Patteson*, J.—*Ex parte Fry*, H. T. 1835, B. C., 3 D. P. C. 338. Sed vide *Eyre* v. *Shelley*, 6 M. & W. 269; S. C. 8 D. P. C. 185).

certificate in Chancery, though he afterwards, without leave, had taken it out in this Court, the Master had refused to tax the defendant's costs upon the plaintiff discontinuing the suit. On motion to shew cause why the Master should not be directed to review his taxation—

to take out his certificate in King's Bench, Common Pleas, or Chancery, cannot do so in the Exchequer without leave.

*Per Cur.*—If this rule were not to be discharged, this Court would be holding out a premium to individuals who have been struck off the rolls of other Courts to practise in this. This is not a case in which the plaintiff is to lose or be deprived of his costs, if he had made any advances of money, he had an opportunity of saying so; but the question is, whether a person who is admitted to be incapable of practising in the Courts of King's Bench and Common Pleas, and, in point of law, is incompetent to practise in the Court of Chancery, is entitled to call upon this Court to lend their assistance to enable him to recover his costs. After the interval of twelve months an attorney is not entitled to take out his certificate as of course, but must first apply to the Court upon an affidavit of the circumstances which have occasioned the omission.

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*Ex parte* Jones, H. T. 1834. K. B. 2 *D. P. C.* 451.

But, after admission, an attorney may take out his certificate without re-admission.

The applicant had been admitted already more than a year; but had never taken out his certificate, nor had he practised. On motion to re-admit—

*Per Parke*, J.—This application is unnecessary. The rule only applies to those cases in which an attorney has taken out his certificate after admission, and then ceased to take it out.

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4. *Consequences of being improperly obtained, or not obtained at all.*

1st. *Consequences of being improperly obtained.*

Pearce *v.* Whale, H. T. 1826. K. B. 5 *B. & C.* 38; S. C. 7 *D. & R.* 512.

A certificate, though improperly obtained, is primâ facie a protection.

In an action for work and labour as an attorney, the plaintiff having proved the business done by him in the Common Pleas, in 1824—

The Court held, that although an attorney, who omits for a year to take out his certificate, is forbidden under a penalty to practise as an attorney until he be re-admitted; yet proof of a certificate, though irregularly obtained, is sufficient primâ facie evidence of his being lawfully authorized to practise. And to get rid of this presumption, it is not sufficient to show that he has not been re-admitted of the Court in which he was originally admitted; because it will be presumed that he has been properly admitted in some Court; and the party who attempts to show he was not authorized to practise, must show that he had no authority in any Court.

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2nd. *Consequences of not being obtained at all.*

1. *Of the Penalties*.*

SLACK *v.* WILKINS, M. T. 1832. Ex. 1 *C. & M.* 23; S. C. 1 *Tyrw.* 158.

Practising without a certificate renders the attorney liable to an action for penalties.

THE 26 Geo. 2, c. 46, s. 12, prohibits attornies from practising at the Quarter Sessions, unless they are not only inrolled but continue so. The defendant having so practised during a period in which he had neglected to take out his certificate, in an action for the penalties—

*Per Cur.*—It appears the defendant had been admitted and inrolled, but during the year 1815 and 1816 neglected to take out his certificate. Now, it is enacted by 37 Geo. 3, c. 90, s. 31, that a person so neglecting to obtain his certificate shall be incapable of practising, and that the admission and inrolment of such person shall be from thenceforth null and void. This gentleman's admission and inrolment, therefore, by not taking out his certificate, became null and void. He therefore did not continue "entered upon the roll," and was not "inrolled as aforesaid;" and not being "inrolled as aforesaid," and being proved to have practised, he became liable to the penalties.

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*In re* HODGSON AND ROSS, E. T. 1835. K. B. 3 *Ad. & E.* 224; S. C. 4 *N. & M.* 763.

But they are not recoverable under 22 Geo. 2, where the party for whom an attorney acts has been admitted, but omitted to take out his certificate.

BY the 22 Geo. 2, c. 46, s. 11, if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or suffer his name to be made use of upon the account of or for the profit of any unqualified person, &c., knowing him not to be duly qualified, every such attorney so offending shall be struck off the roll, and for ever disabled from practising as an attorney, &c. By the 37 Geo. 3, c. 91, s. 31, any attorney neglecting to take out his certificate for the space of one whole year shall, from henceforth, be incapable of practising; and the admission, entry, inrolment, or register of any such person shall be from thenceforth null and void.

The Court held:—That, looking at the difference of the two statutes, the admission of a person who had neglected to take out his certificate for a year was not made, by the latter statute, so far null and void as to render the attorney an unqualified person within the meaning of 22 Geo. 2, c. 46, s. 11, therefore liable to penalties.

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HODKINSON *v.* MAYOR, H. T. 1837. K. B. 1 *N. & P.* 397; S. C. 6 *Ad. & E.* 194.

So, an attorney who ceased to take out his certificate, but who has practised in the County Court, is not liable to penalties under the 12 Geo. 2.

IN an action of debt for penalties under the 12 Geo. 2, c. 13, s. 17, it was admitted, on the trial, that the defendant was duly admitted an attorney of the Court of King's Bench in the year 1827; and that he had taken out his certificate, but had omitted to do so in 1834, during which year he commenced proceedings on behalf of one A. B. in the County Court at Stafford. It was contended, the real effect of this neglect is, that he must obtain an order of the Court to be re-admitted; his name is not expunged, though he be-

* The indemnity act occasionally passed, in cases of omission to take out certificates, applies to parties who have taken degrees at the universities.

comes incapable of practising. Upon a rule of Court for his re-admission, he is sufficiently entitled to practise (*per* Lord *Tenterden*, C. J., in *Coren* v. *Sharpe*); and the case of *Ex parte Hodgson and Ross*, determined even in a case of fraud, an attorney who was uncertificated was not an unqualified person, so as to subject a party to be struck off the roll who allowed him to practise in his name.

*Per Cur.*—We think the case of *Ex parte Hodgson and Ross* is a distinct authority for the defendant; indeed, it is stronger than the present.

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MATTHEWS *v.* SMITH, E. T. 1835. C. P. 1 *Bing. N. S.* 734; S. C. 1 *Scott*, 705; S. C. 3 *D. P. C.* 636.

Where an action has been brought for penalties the Court will not allow the defendant, who has inadvertently omitted to insert his name on the roll, to enter it nunc pro tunc.

IN an action against an attorney on the 2 Geo. 2, c. 23, for defending an action, not being duly inrolled, a rule was obtained, calling on the plaintiff to shew cause why the record of the defendant's inrolment should not be made up as of a certain time, for the purpose of protecting the defendant from the action.

*Sed per Cur.*—We have not authority to grant this application. Undoubtedly, if the rights of third parties were not interfered with, if the motion was merely like a motion to enter up judgment nunc pro tunc, we should be ready to lend our aid to protect the interests of the party; but here a third person interposes, and we have no authority to deprive him of any advantage which he might expect to derive from going on in an action allowed by law against the defendant.

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2. *Effect of, on legal Proceedings.* See post, div. IX. (*c*), 2nd. 3.

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(*g*) RE-ADMISSION. See also, ante, p. 438.

1. *Notice of Intention to apply for*.*

*Ex parte* SENIOR, H. T. 1833. K. B. 1 *D. P. C.* 517.

Notice of re-admission stuck up first day of term,

AN attorney, intending to apply for re-admission, stuck up his notice in the King's Bench Office, at its opening, on the first day of the term of which his notice was intended to be given. In support of the motion, *En parte Davey*, 4 D. & R. 646, was cited, where an attorney, intending to apply to be re-admitted on the roll, affixed his notice outside the Court, in the morning before the sitting of the Court on the first day of the term of which notice was intended to be given.

The Court held that it was a sufficient compliance with the rule of T. T. 33 Geo. 3.

* By rule H. T. 6 Will. 4, recites, "It is expedient that, upon the re-admission of attornies, the Judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinued to practise, and as to their conduct and employment during the time of such discontinuance, it is further ordered, that, at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted with the Master or Prothonotary, as the case may be; which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also, at the same time, cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of King's Bench; and the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

*Ex parte* PILKINS, T. T. 1832. K. B. 2 *D. P. C.* 203.

on the opening of the office, is sufficient.*

A TERM'S notice was essential in this case. On motion to re-admit, it appeared that the notice in the King's Bench Office had not been stuck up until the opening of the office on the first day of the term. The reason given for this omission was, that he did not go to the office on the previous day until it was closed.

*Taunton*, J., after consulting the other Judges, was of opinion—That a notice affixed before the sitting of the full Court on the first day of term, was sufficient, and therefore granted the application.

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*Ex parte* NUTTALL, E. T. 1835. K. B. 3 *Ad. & E.* 188.

And a notice, stating a wrong term, such as Trinity for Easter, no objection.

ON motion to re-admit, it appeared that the applicant, who was off the rolls from his agent having neglected to take out his certificate, gave notice to the stamp-office, before Easter Term, that he should move for re-admission in Trinity Term; Trinity being mentioned in the notice by mistake for Easter. On affidavit of the fact, and by consent of the stamp-office—

The Court allowed the re-admission in Easter Term.

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2. *In what Court.*

*Ex parte* MARTIN, E. T. 1839. Ex. 5 *M. & W.* 1; S. C. 7 *D. P. C.* 334; S. C. 7 *D. P. C.* 412.

Under 1 & 2 Vict., after re-admission in one Court, he may practise in another—as in the Exchequer

AN attorney had been admitted in the Queen's Bench; and a doubt having arisen whether the 1 Vict. c. 56, and 2 Vict. c. 45, applied to re-admissions, as well as to original admissions, or whether it was necessary that the party should also be re-admitted in this Court, in order to enable him to practise.

*Per Cur.*—No re-admission in this Court is necessary.

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*Ex parte* THOMPSON, E. T. 1839. C. P. 5 *Bing. N. S.* 380; S. C. 7 *Scott*, 543.

and Common Pleas; in fact, it extends to the other Courts.

THE stat. 1 & 2 Vict. c. 45, s. 3, enacts, "that attornies admitted in one Court shall be thereby entitled to practise in the others." The applicant had been re-admitted in the Queen's Bench. On motion to re-admit him in this Court—

The Court said, if he is re-admitted in the Queen's Bench, he may practise here. The application is unnecessary.

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3. *When requisite; when refused*†.

*Ex parte* MILLER, E. T. 1836. K. B. 4 *Ad. & E.* 1006.

A party who

The applicant, who had practised regularly, under a certificate, in

* There must be a new notice of the term; hence a party cannot apply to be re-admitted on a notice given in a former term. (*Coleridge*, J.—*Ex parte Mosley*, T. T. 1835, B. C., 4 D. P. C. 69). But, when after a rule granted for re-admission, the party did not practise, from ill health; the Court allowed his re-admission in the following year, without giving new notices. (*Patteson*, J.—*Ex parte French*, H. T. 1836, B. C., 5 D. P. C. 374).

† An admitted attorney, who has never taken out his certificate, need not be

this Court and the Court of Common Pleas at Lancaster, and had subsequently discontinued practice, and then been employed as superintendent of collieries, and had afterwards been re-admitted an attorney in the Court of Common Pleas at Lancaster, all previously to Reg. H. T. 6 Will. 4, c. 6, was, after that rule, re-admitted an attorney of this Court, without the affidavit required by the rule—

The Court was of opinion that rule H. T. 6 Will. 4, did not apply to the present case.

has been admitted, but ceased to practise, may be re-admitted in King's Bench if he has been re-admitted in the Common Pleas of Lancaster.

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MIDDLETON *v.* CHAMBERS, E. T. 1840. C. P. 8 *D. P. C.* 545.

ACTION on an attorney's bill. The pleadings disclosed that the plaintiff, an attorney, had been admitted in the Court of King's Bench; but ceased to take out his certificate, and did not practise. After the expiration of two years he was re-admitted in the King's Bench, but again discontinued his certificate and ceased to practise. Three years subsequently he applied to the Common Pleas to be admitted on his articles of clerkship, taking no notice of his previous admission and re-admission in the King's Bench. He was admitted and took out his certificate without paying the arrear of duty. On demurrer—

The Court held, that the non-payment of the arrears of duty at such admission did not make the admission void under the provisions of the Stamp Acts, though he might be liable for the duty, on motion to have his admission cancelled.

An attorney had been admitted and re-admitted in the King's Bench; and, after ceasing to practise three years in King's Bench, was admitted in the Common Pleas on his articles:—Held, that the admission was not void, under the Stamp Act, for non-payment of the arrears of duty.

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### 4. *When with or without Payment of Fine or Arrears of Duty.*

*Ex parte* THOMPSON, T. T. 1833. K. B. 2 *D. P. C.* 160.

MOTION to re-admit the applicant who had been regularly admitted; but, from a change in his circumstances, he had discontinued to take out his certificate. During such discontinuance, however, he had ceased to practise.

*Taunton*, J., held, he might be re-admitted without paying any fine or the arrears of duty.

Where an attorney took out no certificate, and did not practise, he was re-admitted without fine or duty*.

re-admitted. (*Parke*, J.—*Ex parte Jones*, H. T. 1834, B. C., 2 D. P. C. 451—S. P. *Williams*, J.—*Ex parte Marshal*, E. T. 1838, B. C., 6 D. P. C. 526). Where an attorney had ceased to practise for thirty years, the Court refused to re-admit him. (*Littledale*, J.—*Ex parte Billings*, H. T. 1836, B. C., 5 D. P. C., 395). Though, where an attorney has practised seven years, and has been off the roll twenty-seven years, during which he has not been engaged in the law, but then becomes a managing clerk in the office of an attorney, who swears to his capacity as a lawyer, the Court will allow him to be re-admitted. (*Williams*, J.—*Ex parte Brabant*, E. T. 1839, B. C., 7 D. P. C. 622).

* But where the agent of an attorney who had recommenced practice, omitted to take out the certificate, he was permitted to be re-admitted without a term's notice, on payment of arrears and a small fine. (*Williams*, J.—*Ex parte Thorpe*, E. T. 1835, B. C., 3 D. P. C. 592). And an attorney who has omitted to take out his certificate from poverty, but has continued to practise, in hopes of being able to do so, was re-admitted on payment of the duty and a small fine. (*Patteson*, J.—*Ex parte Philpot*, H. T. 1835, B. C., 3 D. P. C. 339). So, an attorney, whose name had only been off the roll for two days, was allowed to be re-admitted on a small fine and arrears of duty. (*Littledale*, J.—*Ex parte Minchin*, M. T. 1836, B. C., 5 D. P. C. 253). But, to enable a party to be re-admitted who has practised without his certificate, an affidavit that notice has been given to the Stamp-office must be produced. (*Patteson*, J.—*Ex parte Franks*, H. T. 1835, B. C., 3 D. P. C. 319—S. P. *Patteson*, J.—*Ex parte Bridgman*, H. T. 1835, B. C., 3 D. P. C. 371)

*Ex parte* PHILCOX, H. T. 1834. K. B. 2 *D. P. C.* 450.

Or, an attorney who has practised abroad may be re-admitted without fine or duty*.

THE applicant had discontinued to take out his certificate for four years; and during that period he had not practised in this country, although he had practised abroad. On motion to re-admit, without fine or arrears of duty—

*Parke*, J., allowed it, saying—The act only applies to practising in this country.

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*Ex parte* RIGBY, E. T. 1833. K. B. 1 *N. & M.* 593—S. P. *Ex parte* JONES, T. T. 1833. B. C. 2 *D. P. C.* 199.

But where his clerk omitted to take out the certificate, the applicant being in ignorance of it, a small fine was imposed.

ON motion to re-admit, it appeared that the applicant had taken out his certificate for many years, and had been in the habit of employing his clerk to do so; but that, in the last year, through an error of the clerk, no certificate had been taken out. But the moment he discovered the omission the application was made.

*Per Cur.*—Rule absolute, upon payment of a moderate fine.

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*Ex parte* BINNS, E. T. 1836. K. B. 4 *Ad. & E.* 1005.

And an attorney who had practised in the hundred Court† was only allowed to be re-admitted on paying all arrears of duty.

THE applicant was admitted in 1818, and practised with a certificate till 1829. He then (by reason of the state of his affairs) ceased renewing his certificate; after which he occasionally practised in (but no other) the Court for the hundred of the High Peak, in the county of Derby, for the recovery of debts under 5*l.* On motion to re-admit, without paying arrears of certificate duty—

*Per Cur.*—He must pay all the arrears of duty for the time during which he has practised without a certificate.

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5. *Motion for*‡.

*Ex parte* OWEN, M. T. 1832. K. B. 1 *D. P. C.* 511.

Application to re-admit must be made in Court.

ON motion to re-admit, the affidavit being insufficient, a request was made for permission to produce an amended affidavit at Chambers.

*Sed per Littledale*, J.—These matters must always be settled in open Court during term.

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*Ex parte* YATES, H. T. 1833. C. P. 1 *D. P. C.* 724; S. C. 9 *Bing.* 455; S. C. 2 *M. & Scott*, 618.

A rule for re-admission in

AN attorney had been struck off the roll in Common Pleas, upon reading a rule for striking him off in King's Bench;

* And re-admission on a nominal fine, where the attorney discontinued his practice on account of ill health. (*Ex parte Maliphant*, 7 Moore, 495). But if he has acted as a clerk, on re-admission he must pay the arrears of duty and a nominal fine. (*Ex parte Sherwood*, 7 Moore, 493). So, re-admission on same terms, where, through mistake, an attorney acted several years without proper duty on certificate being paid. (*Patteson*, J.—*Ex parte Jones*, T. T. 1833, B. C., 2 D. P. C. 199).

† Re-admission allowed, without fine or arrears, where the applicant had only practised in a borough Court and served process for other attornies. (*Littledale*, J.—*Ex parte Thomson*, M. T. 1836, B. C., 5 D. P. C. 275).

‡ On motion to re-admit, if it appear that the attorney must have been admitted by stating that he has been a practising attorney and regularly taken out his certificate it is sufficient, although not stated as a fact. (*Patteson*, J.—*Ex parte Wentworth*, T. T. 1834, B. C., 2 D. P. C. 607).

The Court re-admitted him upon reading a rule of King's Bench for his re-admission, the innocence having been there established.

King's Bench may be read in Common Pleas.

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6. *Effect of Application.*

CORENV. SHARPE, M. T. 1830. K. B. 1 *B. & Ad.* 386.

THE name of the plaintiff, an attorney, appeared on the roll, and after ceasing to practise, a rule had been obtained for re-admitting him.

The Court held, that he was entitled to practise and recover for business done, after the rule and before the re-admission was entered in the Master's office.

An attorney may recover for business done after rule obtained for, but before re-admission entered.

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(*h*) OF QUALIFIED PERSONS PRACTISING IN THE NAME OF ANOTHER ATTORNEY.

CHADWICK *v.* HOUGH, E. T. 1835. Ex. 2 *C., M., & R.* 29.

THE notice of the defendant's bail in this case was objected to, that it was not properly signed. It was given thus, "Eley, Chancery Lane, by Mr. Cole." Mr. Eley was not an attorney of this Court, though Mr. Cole was.

*Per Alderson*, B.—If authority be given to use his name, the proceedings must be in his name. The notice should therefore have been given in the name of Mr. Cole.

Where A., an attorney, allows B., an attorney, to use his name, the proceedings must be in the name of A. only.

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(*i*) OF UNQUALIFIED PERSONS PRACTISING.

CONSTABLE *v.* JOHNSON, M. T. 1832. Ex. 1 *D. P. C.* 598.

AFTER issue joined, and notice of trial given, a rule was obtained to stay all the proceedings in this action, on the ground that the attorney, whose name was indorsed in the process, and who had acted for the plaintiff in the cause, had not been admitted an attorney of this Court.

The Court said, that proceedings should be stayed until a proper attorney was appointed, the present attorney paying the costs of the application.

Proceedings by an attorney in a Court where he is not admitted, will be stayed at any time until a proper attorney be appointed.*

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PATTERSON *v.* POWELL, H. T. 1833. C. P. 2 *M. & Scott*, 773; S. C. 9 *Bing.* 620.

MOTION to set aside proceedings on the ground that notice of trial by proviso had been given in the name of one who had ceased to be an attorney of the Court.

*Per Cur.*—The proceedings therefore are clearly irregular, and must be set aside.

In another case, proceedings taken in the name of a person who ceased to be an attorney, were set aside in Common Pleas.

* An unqualified person practising in the name of an attorney, renders himself liable to imprisonment. (*Patteson*, J.—*In re Hodgson*, H. T. 1835, B. C., 3 D. P. C. 330). And an unqualified person having practised as an attorney, being a prisoner for debt, was, upon being sentenced to three months' imprisonment, brought before the Court by a special order, it appearing he was not able to pay the expense of a day rule. (*In re Clark*, 3 D. & R. 260). But a party who, without knowledge of the fact, employs an uncertificated attorney, is entitled, if he succeeds, to the costs from the adverse party. (*Patteson*, J.—*Wilson* v. *Knapp*, E. T. 1840, B. C., 8 D. P. C. 426).

PATERSON *v.* POWELL, E. T. 1833. C. P. 3 *M. & Scott,* 195.

But where after action brought, it is discovered that an attorney of King's Bench, who has sued in the name of an attorney of Common Pleas, who has ceased to be an attorney of Common Pleas, the plaintiff was allowed to discontinue.

A CAUSE had been tried, and a verdict found for the plaintiff, which was afterwards set aside by the Court, on the ground that the contract upon which the plaintiff sued was illegal and void. After a rule for a new trial, was made absolute, on motion for leave to discontinue the action without costs, upon an affidavit stating that the plaintiff's acting attorney was not an officer of this Court, and had therefore conducted the proceedings in the name of C. H., formerly an attorney of this Court, under a written general authority given to him several years ago; and that, since the year 1830, C. H. had ceased to take out a certificate as a London attorney—

The Court permitted the plaintiff to discontinue without payment of costs, except as to so much as might be found to have been paid by the defendant to his attorney on account of the suit.

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BAYLEY *v.* THOMPSON, E. T. 1834. Ex. 2 *C. & M.* 673.

However, proceedings by an attorney not on the roll cannot be treated as a nullity.

A DECLARATION was delivered by the plaintiff in the name of F. D., as his attorney, and it appeared that F. D.'s name was not on the roll, or entered in the books of this Court, and that he had not taken out any certificate. The defendant signed judgment of non pros. On motion to set it aside—

*Per Cur.*—It is quite clear that you cannot treat proceedings as a nullity where they are carried on by an attorney; but the course is, to apply to stay the proceedings until a proper attorney is appointed.

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## II. PRIVILEGES OF.

### (*a*) WITH REPERENCE TO THE MODE OF SUING, AND PROCEEDINGS INCIDENT THERETO.

1. *In what Court**.

2. *Of the Process*†.

HAMILTON *v.* JONES, T. T. 1830. C. P. 4 *M. & P.* 523.

Where an attorney is plaintiff he need not indorse his name on the writ.

THE plaintiff was an attorney; and having sued out a ca. sa., motion was made to discharge the defendant out of custody, on the ground that the name and place of abode of the attorney issuing the writ was, not indorsed thereon, pursuant to the stat. 7 & 8 Geo. 4, c. 71, s. 8.

*Sed per Cur.*—It appears that the plaintiff is an attorney of this Court. The present motion has been made on the alleged ground that the requisitions of the stat. 7 & 8, Geo. 4, c. 71, s. 8, have not been complied with on the part of the plaintiff, inasmuch as the

* An attorney admitted, inrolled, and certificated, has still the privilege of suing in his own Court.

† The privilege of attornies of suing by writ of privilege, and being sued by bill, is abolished; and actions by or against them, are now to be commenced by writ of summons, (see summons, writ of,) as in common nonbailable actions against unprivileged persons, whether the party be an attorney of the Court in which the action is brought, or of any other Court, (1 Will. 4, c. 39).

writ bears no indorsement of the name and place of abode of the attorney at whose instance it was issued. The object of that enactment was to remedy the oppression practised by parties improperly issuing writs, in their own names, and thus affording to the defendants no possibility of obtaining relief, they not being tangible by the Court. An attorney, therefore, who sues out process on his own behalf, is expressly excepted out of the operation of the 8th section.

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### 3. *Of the Venue.*

MOUNSEY *v.* WATSON, H. T. 1828. K. B. *7 B. & C.* 683.

The right to lay the venue in Middlesex did not apply where the attorney sued by latitat.*

On motion to bring back the venue, laid in Middlesex, from Cumberland, where the cause of action arose, it appeared that the plaintiff in this case was an attorney, but sued by latitat, and not by attachment of privilege.

*Sed per Cur.*—Unless the plaintiff sued as an attorney, he could not insist upon that privilege. If he sues as a common person, he must be governed by the ordinary rules.

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### (*a*) WITH REFERENCE TO THE MODE OF BEING SUED, AND PROCEEDINGS INCIDENT THERETO.

#### 1. *In what Court.*

LEWIS *v.* KERR, H. T. 1837. Ex. *2 M. & W.* 226; S. C. *5 D. P. C.* 327, 447—S. P. PERCIVAL *v.* COOK, T. T. 1839. *7 D. P. C.* 500.

An attorney is still entitled to be sued in his Court, notwithstanding 2 Will. 4, c. 39†.

IN an action against the defendant, an attorney, he pleaded that he was an attorney of the King's Bench, and not an attorney of the Exchequer. On demurrer—

*Per Cur.*—The 2 Will. 4, c. 39, was not intended to repeal this ancient privilege, either the privilege of an attorney or the privilege of Parliament. The statute only gives a new form of process. The plea is a good plea.

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#### 2. *Process against.*

LONG *v.* WORDSWORTH, M. T. 1832. K. B. *4 B. & Ad.* 367.

The rule H. T., 2 Will. 4, requiring indorsement on process, does not apply to an action against an attorney.‡

IN this case *Patteson*, J. said, we have held that a bill against an attorney is not a process within the rule H. T. 2 Will. 4, requiring an indorsement.

* The privilege of an attorney to lay the venue in Middlesex, only applies where he sues in person, and not when he employs another attorney. (*Taunton*, J.—*Harrington* v. *Page*, T. T. 1833, B. C., 2 D. P. C. 164). But it applies though he has not entered his certificate. (*Patteson*, J.—*Partington* v. *Woodcock*, T. T. 1834, B. C., 2 D. P. C. 550).

† And the 1 Vict. c. 56, does not deprive an attorney of the privilege of being sued in his own Court, but only subjects him to the jurisdiction of another Court in which he has acted. (*Patteson*, J.—*Prior* v. *Smith*. H. T. 1838, B. C., 6 D. P. C. 299).

‡ In *Lewellin* v. *Norton*, E. T. 1832, B. C., 1 D. P. C. 416, it was decided by *Taunton*, J., that the indorsement to be made on a writ under rule H. T. 2 Will. 4, as to the amount of debt and costs, did not apply to a bill against an attorney. But in *Tomkins* v. *Chilcote*, T. T. 1833, B. C., 2 D. P. C. 187, *Taunton*, J., held, that the rule H. T. 2 Will. 4, did apply to a summons against an attorney.

### 3. *Of arresting and Discharge from.*

PITT *v.* POCOCK, M. T. 1833. Ex. 2 *C. & M.* 146; S. C. 4 *Tyrw.* 85.

Even before 1 & 2 Vict. c. 110, an attorney, when sued with an unprivileged person, could not be arrested, but the other defendant might*.

Both the defendants having been arrested on a writ of capias, and given bail, *Parke*, J., on application of the defendant Biggs, stayed the proceedings on the bail-bond, on the ground that he was privileged from arrest as an attorney.

*Per Cur.*—We have spoken to the other Judges upon this question, and they are all of opinion that the attorney in this case does not lose his privilege, as there is a mode without arresting him, by which both defendants may be brought into Court.

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CARLON *v.* DARNFORD, M. T. 1832. C. P. 2 *M. & Scott*, 588.

And where arrested, the Court would discharge him on filing common bail†.

AN attorney of this Court arrested an attorney of the King's Bench. On motion to discharge him out of custody on filing common bail—

*Per Cur.*—The rule must be absolute. Our officers state that an attorney of this Court, if arrested at the suit of an attorney of another Court, is entitled to be discharged, on motion. The cases in the King's Bench are expressly in point, although the practice of the Court of Exchequer differs from that of the Court of King's Bench.

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BOWYER *v.* HOSKINS, H. T. 1827. Ex. 1 *Y. & J.* 199.

But the privilege from arrest did not extend to actions by attornies of the Exchequer.

THE plaintiff, one of the side clerks of the King's Remembrancer's Office, in the Exchequer, having arrested the defendant, an attorney of the King's Bench, after bail given, an application was made that the bail-bond be cancelled.

But the Court refused to interfere, on the authority of the case of *Walker* v. *Ruckbey*, 9 Price, 16, where the Court decided that a side clerk of the Office of Pleas (from which office the process issues) was entitled to the privilege exercised by the plaintiff in this case.

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STRONG *v.* DICKENSON, E. T. 1836. Ex. 1 *M. & W.* 488; S. C. 5 *D. P. C.* 88.

An attorney's privilege from arrest on a ca. sa. does not apply when he is taken whilst engaged in business not connected with the Court.

AN attorney, who had been arrested on a ca. sa., applied to be discharged on an affidavit, in which he stated that having professional business to transact in several causes in this Court and the Court of Common Pleas, he was proceeding through the city of London, on his way to Westminster Hall for that purpose; that on arriving at the Bank of England, he recollected that he had some business to transact with a client, whom he might probably meet at the Auction Mart, he therefore called there on his way to Westminster

* And, (*Keep* v. *Biggs*, M. T. 1833, Ex., 2 D. P. C. 278), the Uniformity Process Act, 2 Will. 4, c. 39, did not interfere with this practice.

† If refused when an attorney was arrested, upon process issuing out of an inferior Court, he might sue out his writ of privilege, which was to be allowed instanter, or if, on process from superior Court, he moved to be discharged on common bail. But *Littledale*, J., refused summarily to relieve an attorney of the King's Bench who had been arrested in the Common Pleas. (*Anon.* M. T. 1830, B. C., 1 D. P. C. 3).

Hall, and there saw his client, and was about to leave him and proceed to Westminster Hall, when he was arrested.

*Per Cur.*—The Court will protect persons who are substantially going or returning to or from the place of business, but it ought to be made to appear, without any doubt, that that was the case. It is not required that the party should proceed at full speed, or by the shortest way. If he had been actually on his road to Westminster, it would have been different; but, on his own statement, he was engaged on other business.

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ANON., M. T. 1830. C. P. 1 *D. P. C.* 208; S. C. 4 *M. & P.* 810.

ON motion to discharge an attorney who had been arrested, out of custody, it appeared that he was arrested while in the discharge of professional duties at an election.

The attorney's privilege from arrest is that of his clients, and not the attorney's.

*Per Cur.*—The privilege of the attorney is only allowed him for the benefit of his clients. It is necessary, therefore, before a party seeks to avail himself of that privilege that he should shew himself to be actually practising at the time. A single instance of being employed at an election is clearly not sufficient.

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NOEL *v.* ISAAC, H. T. 1835. Ex. 1 *C., M., & R.* 753; S. C. 5 *Tyrw.* 376.

TRESPASS for false imprisonment; justification, under a capias; replication, that the plaintiff was an attorney of the Court of King's Bench, and had obtained his certificate to practise, and was by virtue thereof then practising as an attorney therein, whereof the defendants had notice. On demurrer—

Trespass would not lie for arresting an attorney.

*Per Cur.*—This form of action could not be maintained; the only remedy the plaintiff could have was an action on the case for a malicious or wrongful arrest.

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### (*c*) ENTERING AN APPEARANCE*.

### (*d*) TO HIS EXEMPTION FROM THE JURISDICTION OF INFERIOR COURTS.

WRIGHT *v.* SKINNER, H. T. 1836. Ex. 1 *M. & W.* 144; S. C. 4 *D. P. C.* 745—S. P. DYER *v.* LEVY, H. T. 1836. D. C. 4 *D. P. C.* 630.

THE plaintiff was an attorney. On motion, on the part of the defendant, for leave to enter a suggestion on the roll, under the Middlesex Court of Requests' Act, the plaintiff having recovered less than 40*s*. Counsel stated, that he was informed that Mr. Justice *Littledale* had decided the point against the attorney since that statute.

An attorney, when plaintiff, is not bound to sue in the Middlesex Court of Requests†;

*Sed per Cur.*—We find that no judgment was delivered by Mr. Justice *Littledale* in that case to the effect stated. He is of opinion

* The appearance in actions by or against attornies to be as in common cases. See ante tit. *Appearance*,

† In *Elkins* v. *Harding*, (H. T. 1831, Ex., 1 Cr. & J. 345; S. C. 1 Tyrw. 274), it was determined that a clerk in Court, in the Exchequer, entitled to sue by capias, did not lose his privilege by suing with another person not entitled to the same privilege, and not therefore a case for costs within the London Court of Requests' Acts.

that the attorney is still entitled to his privilege; and that is the judgment of all the Judges. Before the Act for the Uniformity of Process, if he did not proceed by attachment of privilege, he put himself in the situation of an ordinary person, and was considered to have waived his privilege. Since that statute, he cannot proceed by that process; he cannot therefore, because he has not used it, be now held to have waived his right of suing in his own Court in all cases, except where the defendant is also an attorney, and then his privilege prevails.

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BISHOP *v.* MARSH, M. T. 1839. C. P. 8 *Scott*, 128; S. C. 6 *B. N. S.* 12; S. C. 8 *D. P. C.* 1.

but his personal representatives are.

THIS was an action, by the executrix of an attorney, for his bill of costs. A verdict had been obtained for less than 40*s.* on an issue tried before the sheriff. A motion was made for entering a suggestion under the Middlesex Court of Requests' Act, (23 Geo. 2, c. 38, s. 19), which was opposed, among other grounds, because, it having been held, in *Wiltshire* v. *Clyd*, (Doug. 381), that an attorney himself was not within the act, his personal representatives ought not to be compelled to go before a tribunal where neither the Judges nor suitors in the cause could have the means of ascertaining the correctness of the charges.

The Court overruled the objection.

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BURN *v.* PASMORE, M. T. 1830. K. B. 1 *D. P. C.* 17.

So, attornies must sue each other in the London Court of Requests, if they sue as common persons*.

ON motion to enter a suggestion on the roll to deprive plaintiff of his costs, under the London Court of Conscience Act, 39 & 40 Geo. 3, c. 104, s. 12, it appeared that the plaintiff and defendant were attornies of the Court of King's Bench. The debt arose within the jurisdiction of the London Court of Conscience Act, and the sum recovered was 5*l.*

*Per Cur.*—If neither the plaintiff nor defendant were attornies, the debt would be recoverable in the Court of Conscience; and if the plaintiff had sued in the superior Court he would have been deprived of costs by the act. But if the plaintiff does not proceed by attachment of privilege, he sues as a common person, and is not entitled to the privileges of an attorney. So, also, if the privilege be lost, the plaintiff must be considered as a common person.

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### (*e*) WHEN A WITNESS.

COLLINS *v.* GODEFROY, H. T. 1831. K. B. 1 *B. & Ad.* 950; S. C. 1 *D. P. C.* 326.

An attorney, a witness, can maintain no action for loss of time against the party subpœnaing him†.

THE plaintiff, an attorney, brought an action to recover remuneration for the loss of time during his attendance, on a subpœna, against the defendant, the attorney in the cause.

*Sed per Cur.*—We are aware of the practice which has prevailed, in certain cases, of allowing as costs between party and party so much per day for the attendance of professional men; but that

* This case was before 2 & 3 Will. 4, c. 39, and the London Court of Requests' Act.

† So an attorney who is a party to a suit, and employs an agent, is only entitled to the expenses of a common witness if his attendance was not necessary. (*Leaver* v. *Whalley*, 2 D. P. C. 80).

practice cannot alter the law. We think, on principle, that an action does not lie for a compensation to a witness for loss of time in attendance under a subpœna.

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*(f)* PRIVILEGE, IN WHAT MANNER AVAILABLE*.

*In re* THOMPSON, T. T. 1837. Ex. 2 *M. & W.* 645; S. C. 5 *D. P. C.* 745.

A writ of privilege merely amounts to a notice that the party is privileged, and is no stay of proceedings.

ON motion to set aside a writ of privilege, on the ground that the applicant was entitled to be sued in his own Court—

*Per Cur.*—It is a mere notice that the party is privileged. It is no injunction. It does not prevent the plaintiff from proceeding, and is nothing more than a document under the authority of this Court, attesting who the party is and what his general privileges are.

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ADAMS *v.* RUGBY, H. T. 1827. C. P. 12 *Moore*, 255.

Where an attorney of King's Bench is arrested by an attorney of Common Pleas†, he must plead his privilege.

THE plaintiff, an attorney of Common Pleas, arrested the defendant, an attorney of the King's Bench. On motion to discharge him—

*Per Cur.*—Though the attorney might be discharged on motion, where the process under which he was arrested issued of the Court of which he was an officer, yet where the process was of another Court, he must plead his privilege. (*Snee* v. *Humphrey*, Impey's Practice).

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PERCIVAL *v.* COOKE, T. T. 1839. Ex. 5 *M. & W.* 293.

A plea of privilege as an attorney need not aver that he is not an attorney of the Court in which he is sued.

THE defendant, an attorney, having been sued in this Court, pleaded in abatement that he was an attorney in the Court of Queen's Bench, without alleging that he was not an attorney in the Court of Exchequer. To this plea there was a demurrer.

*Per Cur.*—The plea in this case is good. By the stat. 1 & 2 Vict. c. 45, amending the act 1 Vict. c. 56, an attorney of one Court is not allowed to practise in another until he has signed the roll of the other Court. The defendant is not bound to negative that fact in his plea; the plaintiff may allege it in his replication.

*See Lewis* v. *Kerr*, 2 *M. & W.* 226.

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DAVIDSON *v.* CHILMAN, M. T. 1834. C. P. 1 *Scott*, 117; S. C. 1 *Bing. N. S.* 217.

But it must be verified by affidavit.

THE defendant, being an attorney of King's Bench, was sued by the plaintiff in the Common Pleas. The defendant accordingly pleaded, in abatement, his privilege as such attorney. No affidavit accompanied the plea. The plaintiff, treating the plea as a nullity, signed judgment. On motion to set it aside, it was contended, at all events the want of an affidavit, if an affidavit were necessary, does not render the plea such a nullity as to warrant the plaintiff in signing judgment.

*Sed per Cur.*—It is a plea to the jurisdiction of the Court, which forms one of the subdivisions of pleas in abatement. The plaintiff, therefore, had a right to sign judgment.

* If an attorney has, by any act, waived his privilege which he has pleaded, that waiver must be replied. (*Patteson, J.—Prior* v. *Smith*, H. T. 1838, B. C., 6 D. P. C. 299).

† This case was before the 1 & 2 Vict. c. 110. See tit. *Arrest.*

## III. DUTIES OF.

BLACKBURN *v.* PEATE, M. T. 1833. Ex. 2 *Cr. & M.* 244; S. C. 2 *D. P. C.* 293.

An attorney who resides out of London, but within ten miles, must enter in the Master's book, within one mile of the office where notices, &c. may be served*.

THE defendant's attorney having searched the book at the office of the clerk of the pleas, and found no entry of the plaintiff's attorney's name and place of abode, or other proper place where he might be served with rules, &c. in London, Westminster, or Southwark, or within one mile of the Office of Pleas, pursuant to rule 8, of Michaelmas Term, 1 Will. 4, fixed up one copy of a plea of the general issue in the Office of Pleas, and transmitted another copy, by the three-penny post, to the plaintiff's attorney at Ilford in Essex, which place is between eight and nine miles from London.

*Per Cur.*—The rule is applicable to two classes of persons; attornies residing in London, and within ten miles of London; and it ought to be construed as requiring that an attorney residing in London shall enter a proper place in London, Westminster, or Southwark where he may be served; and if out of London, and at a distance, as in this case, a place within one mile of the office. By putting this construction on the rule, we shall consult the convenience of all parties.

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GILL *v.* LOUGHER, M. T. 1830. Ex. 1 *Cr. & J.* 170; S. C. 1 *Tyrw.* 121.

So, an attorney, before commencing an action, is bound to ascertain the

IN an action, brought by an attorney against his client, for the costs of a writ and subsequent proceedings (which had apparently been abandoned for want of evidence), and the jury had found a verdict for the amount of the costs; on the argument upon a rule

* By rule M. T. 5 Will. 4, attornies must enter their admissions and certificates with the clerk of the warrants, and pay termage fees. (1 Bing. N. S. 411; and 1 Scott, 289).

And it is the duty of an attorney to declare, whether writ issued by his authority, and to declare name and place of abode of his client. The 2 Will. 4, c. 39, s. 17, enacts, "That every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court, or any Judge of the same or of any other Court, shall so order and direct, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said Court, or any Judge of either of the said Courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance."

On this statute, Rule M. T. 3 Will. 4, "Ordered, that if any attorney shall, as required by the act, declare that any writ of summons or capias upon which his name is indorsed was not issued by him or with his authority or privity, all proceedings shall be stayed until further order."

It is an attorney's duty to declare whether he has issued a writ or not. The 17th section of the Uniformity of Process Act, as to attornies declaring whether writs have been sued out in their names, applies both to serviceable and bailable process. (*Patteson*, J.—*Gilson* v. *Carr*, H. T. 1836, B. C., 4 D. P. C. 618).

Where an attorney gave the wrong address of his client without making proper inquiries, the Court made him pay the costs of the motion; and not being, after inquiries, able to discover his client, made him pay the costs of the action. (*Neal* v. *Holden*, H. T. 1835, Ex., 3 D. P. C. 493).

nisi obtained for entering a nonsuit on grounds reserved at the trial, (but which grounds failed on such argument), it appeared, from the Judge's notes at the trial, that the attorney received his instructions through the medium of a third party, a collector of debts, and without any personal interview with the defendant, who had, through such third party, forwarded a written retainer and authority to the attorney.

nature of his client's claim, and what evidence he has to support it*.

The Court held that it is the imperative duty of an attorney to inform himself correctly of the nature of his client's demand, and of the proof which can be adduced in its support; and therefore, in the exercise of their duty for the protection of suitors, they were called upon to interpose between the attorney and his client, and suggested a stet processus, or, at the attorney's option, a reference to the Master to report whether proper inquiries had been made by him before action brought, with a condition annexed for payment of all costs by him if the report should be in the negative; or, failing the attorney's concurrence in either of those proposals, a new trial to be had between the parties.

## IV. DISABILITIES OF†.

SAVORY *v.* CHAPMAN, E. T. 1840. K. B. 3 *P. & D.* 604; S. C. 8 *D. P. C.* 656.

To an action againt the marshal for an escape he pleaded, that one W., being the attorney of one D., the execution creditor, as such attorney, directed the defendant that he should forthwith discharge one C. out of custody as to the action; and that W., as such attorney, gave license to the defendant to discharge C. out of the custody of the defendant; and that the defendant did so accordingly. On demurrer to the replication—

An order by the plaintiff's attorney to discharge a debtor in execution out of custody, is not binding unless with the consent of his client, or the debt has been paid.

*Per Cur.*—We think an attorney, without the sanction of his client, or without payment of the debt, has not the power to discharge a debtor out of custody. A defendant, in execution, to procure his discharge, must pay; or the plaintiff may dispense with payment and shew him favour; but the attorney cannot shew him favour and consent to his discharge without payment, or the express consent of his client.

* It is the duty of an attorney who receives an undertaking from his opponent to have it reduced in writing and signed. (*Gurney*, B.—*Greenwood* v. *Eldridge*, Sum. Ass. 1833, N. P., 6 C. & P. 128). But it is not incumbent upon an attorney, where a sheriff had paid money to him, to detain it, on the ground that the levy was wrongful. (*Bailey*, B.—*Sibley* v. *Leicester*, M. T. 1833, Ex., 2 D. P. C. 234).

† An attorney cannot be bail; if he does, he subjects himself to the animadversion of the Court. (*Harper* v. *Tahourdin*, 6 M. & Selw. 383).

After service of process on an attorney, if he leave his abode, the rule to compute may be left at his residence; and a notice may be affixed in the King's Bench office. (*Patteson*, J.—*Sealey* v. *Robertson*, T. T. 1834, B. C., 2 D. P. C. 568).

So, a rule may be served on an attorney's clerk in Court, if it appears attempts have been made to serve him, but he keeps out of the way. (*Hinton* v. *Dean*. M. T. 1835, Ex., 4 D. P. C. 352).

## V. HOW APPOINTED TO SUE AND DEFEND.

### (*a*) What amounts to.

NELSON *v.* SLACK, H. T. 1833. C. P. 2 *M. & Scott*, 820.

Submission to taxation amounts to an admission of retainer*.

ON motion that the prothonotary review his taxation, it appeared that a Judge's order had been obtained for the taxation of the bill of costs of Mr. Towne, the plaintiff's attorney; but the prothonotary, conceiving that he had a right to question the retainer of Mr. Towne, refused to tax a portion of the bill.

*Per Cur.*—Where an attorney's bill is referred generally to the officer for taxation, he cannot take into his consideration the question of retainer; that is tacitly admitted by the submission to taxation.

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HAMMOND *v.* THORPE, T. T. 1834. Ex. 1 *C., M., & R.* 64.

So, a juror being withdrawn by a party's consent establishes a retainer.

IN this case the parties agreed to withdraw a juror. Afterwards the defendant obtained a rule, calling upon the plaintiff's attorney to shew cause why he should not pay the defendant's costs, on the ground that the action had been brought without the consent and authority of the plaintiff.

*Per Cur.*—For such an application there is no precedent. If the trial had proceeded, and a verdict had been given for the defendant, then, perhaps, in event of the plaintiff not being able to pay the costs of the defendant, the Court might have placed the attorney of the plaintiff in his situation and compelled him to prove his retainer; but, as the defendant had consented to pay his own costs, he cannot now cast the burthen on another person.

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WEBB *v.* RHODES, E. T. 1837. C. P. 3 *Bing. N. S.* 732; S. C. 4 *Scott*, 497.

So, where a lease is to be prepared by the lessor's attorney, at the expense of the lessee, it amounts to a retainer by the lessee†.

THE lessee and the tenant for life, of certain property, signed a memorandum of agreement, by which it was agreed that the lessee should have a further lease for a certain term, if the tenant for life should so long live, and that the attorney of the tenant for life should draw the lease and counterpart at the expense of the lessee, and the lessee had, subsequently, interviews with the attorney, on which he perused the drafts, approved of what had been done, and desired that they should be engrossed. Upon the death of the tenant for life, before the lease was executed, in an action by the attorney against the lessee—

The Court held, that the defendant was liable to the plaintiff for the costs of what had been done, inasmuch as the defendant's conduct was such as had warranted the presumption that he had retained the plaintiff as his attorney upon that particular occasion, and for the performance of that particular business.

* Where plaintiff, an attorney, was retained by defendant's father, which defendant knew and did not disapprove of:—Held, that it amounted to a retainer. *Cameron* v. *Baker*, E. T. 1824, N. P., 1 C. & P. 268).

† A mere appearance before a Judge, on summons, does not make the attorney the attorney in the action. (*Spencer* v. *Newton*, E. T. 1837, K. B., 6 A. & E. 630).

HOULDITCH *v.* SWINFEN, E. T. 1836. C. P. 2 *B. N. S.* 712; S. C. 3 *Scott*, 169.

The attorney's retainer must expressly appear on motion to reverse an outlawry.

ON motion to set aside an outlawry, it was objected that it did not appear upon the face of the affidavits upon which the motion was founded, that the attorney who assumed to act for the defendant was properly constituted by the defendant. *Plunkett* v. *Buchanan*, 3 B. & C. 376, 5 D. & R. 625, was cited, where it was held, that an attorney making an affidavit in support of an application to reverse an outlawry against a defendant, who does not appear personally, must shew, in express terms, that he is duly authorized by the outlaw to make the application.

The Court, thinking the authority of *Buchanan* v. *Plunkett* to be decisive, discharged the rule.

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WEST *v.* TAUNTON, H. T. 1830. C. P. 6 *Bing.* 404; S. C. *M. & P.* 79.

An attorney who appears for his Majesty sufficiently declares his authority by stating, "that he has been appointed solicitor on behalf of his Majesty, and acts as such on his behalf."

TO an action of trover, the defendant pleaded, that he, by A. B. C., who has been duly appointed solicitor on behalf of his Majesty, under the directions of the commissioners of his Majesty's customs, and who acts as such solicitor under such directions in this behalf, comes and defends the wrong and injury, when &c., and says &c., the plaintiff thereupon signed judgment, treating this plea as a nullity, because the defendant had neither appeared personally nor by an attorney of this Court, appointed by him, but by a solicitor of his Majesty, who had no authority to act as attorney, except in revenue matters, pursuant to 9 Geo. 4, c. 25. On motion to set aside the judgment, upon an affidavit by the defendant that he had no interest in the cause, and was indemnified by the commissioners of his Majesty's customs, having seized the property sought to be recovered in his capacity of an officer of police—

*Per Cur.*—The judgment must be set aside. The plaintiff, therefore, had no right to treat this plea as a nullity; but we do not conclude him by this decision, because he may sue for the penalty if there be a want of the requisite authority. In revenue matters, persons who have been appointed pursuant to the 9 Geo. 4, c. 25, are authorized to act as attornies. A. B. C. appears, by affidavit, to have been so appointed; and the defendant being entitled to employ him, under the circumstances of the case, he was authorized to act. The statute does not confine the privilege to cases in which the Crown is concerned.

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### (*b*) EFFECT OF THE APPOINTMENT.

DOE *d.* DAVIES *v.* EYTON, T. T. 1832. K. B. 3 *B. & Ad.* 785.

An attorney who proceeds under a retainer, which turns out to be forged, proceeds at his peril.

A PARTY retained attornies to prosecute an ejectment in the name of D., under a power of attorney. The attornies took down the cause for trial, but withdrew the record, the costs of which the defendant sought to recover from the attornies, the power being disavowed by D., and the instrument alleged to be forged.

The Court ordered the attornies to pay such costs, D. giving them security to repay the amount, if they should, in an issue to be tried, establish that the action had been carried on with the privity of D.

### (*c*) Duration of the appointment.

Macbeath *v.* Ellis, E. T. 1828. C. P. 4 *Bing.* 578; S. C. 1 *M. & P.* 513. *By name of* Macbeath *v.* Cooke.

The signing final judgment ends the attorney's authority*.

A plaintiff had been charged in execution for costs on a verdict obtained by three several defendants; two of them signed a note for his sixpences, and the attorney who conducted the cause signed for the third, who was abroad, but without authority to act for him, since the judgment was signed.

The Court held the note to be insufficient, as it was necessary that all the creditors in the suit should sign it, and said that the rule applied to this case, although the parties signing were defendants, and that, when final judgment was signed, the authority of the attorney of the absent party was determined.

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### (*d*) acting without an appointment.

Mudry *v.* Newman, T. T. 1834. Ex. 1 *C., M., & R.* 402.

Where an attorney brings an action without the plaintiff's authority, the plaintiff's remedy is against the attorney†.

On a motion for judgment as in case of a nonsuit, it appeared that the action was commenced and carried on in the plaintiff's name without his authority or knowledge, and that the attorney could not be found after diligent inquiry.

Held, that this was no answer to the motion, and that the plaintiff's only remedy was against the attorney, but the Court, under the circumstances, enlarged the rule.

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## VI. HOW CHANGED, AND EFFECT OF.

May *v.* Pike, T. T. 1838. Ex. 4 *M. & W.* 197; S. C. 6 *D. P. C.* 667.

There must be a rule to change the attorney‡ where an attorney has acted for a party, though

The question was, whether the plaintiff was justified in disregarding certain proceedings taken by the defendant, without a rule for changing his attorney. It appeared that an appearance had been entered by the plaintiff sec. stat., and that there was no attorney for the defendant on the record, but that a Mr. Dickenson had accepted the declaration as his attorney, and was so treated by the

* A retainer to commence a suit, which abates, is evidence of a retainer to commence another. (*Abbott*, C. J.—*Crook* v. *Wright*, T. T. 1825, N. P., R. & M. 278). But where, after a party had retained an attorney, he assigned his estate, &c. to trustees, who directed him to go on:—Held, that they were not liable for the prior business, unless they had bound themselves by writing. (*Becke* v. *Penn*, 7 C. & P. 397). Where, after plaintiff's attorney's death, money was paid, and a receipt given:—Held, a good payment, unless the authority had been countermanded. (*Taunton*, J.—*Vorley* v. *Garrad*, E. T. 1834, B. C., 2 D. P. C. 490).

† But an attorney who, under a writ, sued out without authority, received debt and costs:—Held, that money had and received lay to recover it back. (*Parke*, J. —*Dupen* v. *Keeling*, M. T, 1829, N. P., 4 C. & P. 102).

‡ And the order to change must be served on the opposite party. (*Patteson*, J.—*Rex* v. *Boyd*, E. T. 1833, B. C., 2 D. P. C. 147). The want of an order for changing an attorney is waived by the opposite party treating the new attorney as one duly appointed. (*Williams*, J.—*Farley* v. *Hebbes*, E. T. 1835, B. C., 3 D. P. C. 538). And if a defendant who is an attorney, really appears in person, but in

plaintiff. A second summons for leave to plead, several matters was taken out by a different attorney; and the plaintiff treating this as a nullity, signed judgment when the previous time for pleading was out.

his name be not on the record.

*Per Cur.*—The first gentleman had acted as attorney in the cause up to a certain time, and he could not be changed without a rule for that purpose.

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CHESLYN *v.* PEARCE, H. T. 1836. Ex. 4 *D. P. C.* 693.

IN this case, the notice of trial had been countermanded, and being signed "B. Brock, plaintiff's attorney," the attorney for the plaintiff on the record being Joseph Cragg. The notice of countermand was served in the country, and it was contended that it should have been signed by Mr. Cragg, he being the attorney on the record; or, if Mr. Brock was agent, he was misdescribed as the attorney, and therefore the notice might be treated as a nullity.

But notice of countermand in the name of a different attorney to that on the record, is good, if defendant be not misled.

*Per Cur.*—The defendant could not have been misled. The meaning of rule H. T. 2 Will. 4, is, that notice of countermand may be given by the attorney or agent, either in town or country.

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## VII. OF THE RELATIVE SITUATION OF THE ATTORNEY AND HIS AGENT—OF THE ATTORNEY AND HIS CLERK—AND OF THE ATTORNEY AND HIS CLIENT.

### (*a*) OF THE ATTORNEY AND HIS AGENT.

TAUNTON *v.* GOFORTH, T. T. 1825. K. B. 6 *D. & R.* 384.

J. HAD been employed by T., who was also an attorney of the Court of King's Bench, to conduct the suit in the Exchequer, as well as a feigned issue, as his agent. T. obtained a verdict, and died; J., in ignorance of that event, afterwards obtained the postea from the associate, and now claimed to keep possession of it to satisfy his lien thereon, for the costs due to him for agency in the suit in the Exchequer and the trial at law.

The death of an attorney pending an action does not revoke his agent's authority, therefore he may proceed in that action.

*Per Cur.*—We think that, as far as the question of lien or no lien extends, J. must be considered as the attorney of T. for we do not think that that gentleman's death was such a revocation of J.'s authority, as agent, as prevented him from exercising it in an act for the benefit of the representatives of his principal, viz. by obtaining the postea.

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### (*b*) OF THE ATTORNEY AND HIS CLERK*.

point of form as attorney, a plea in the name of another attorney cannot be treated as a nullity, on the ground of no order for change of attorney having been served. (*Williams*, J.—*Kerrison* v. *Wallingborough*, E. T. 1837, B. C., 5 D. P. C. 564). Where the former attorney had been appointed to receive monies upon proceedings under the Lords' Act, the Court refused to withdraw that trust, on the ground of the attorney in the action having been changed. (*Davis* v. *Lane*, M. T. 1835, Ex., 4 D. P. C. 419).

* A receipt by an attorney's clerk for money deceitfully obtained does not bind his master. (*Best*, C. J.—*Williams* v. *Goodwin*, H. T. 1826, N. P., 2 C. & P. 257; S. C. 11 Moore, 342).

### (*c*) Of the attorney and his client.

#### 1. *In general**.

JONES, *In re*, M. T. 1832. K. B. 1 *N. & M.* 128—S. P. *Ex parte* MATAULE, M. T. 1832. K. B. 4 *B. & Ad.* 365.

Attornies have a right to go into the King's Bench prison to see their clients at seasonable times.

ON a rule to shew cause why the applicant, an attorney of this Court, should not be permitted at all times to go into the interior of the prison for the purpose of visiting his clients there. It was opposed, on the ground that the rule of Trinity Term, 21 Geo. 3, gives a discretion to the marshal to admit or refuse to admit whomsoever he shall think proper.

*Sd per Cur.*—That rule cannot apply to a case like the present. That rule seems rather to apply to regulations respecting wives and families, and the introduction of spiritous liquors. The visiters spoken of can hardly mean the attornies who go thither for the benefit of their clients; but, even in such a case, we should certainly consider that the marshal had power to exclude, upon good cause shewn to the Court.

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JOHNSON *v.* MARRIOTT, M. T. 1833. Ex. 2 *C. & M.* 183; S. C. 2 *D. P. C.* 343; S. C. 4 *Tyrw.* 78.

An attorney dismissed by the plaintiff, may afterwards act for the defendant in the same cause.

ON motion to rescind an order for changing an attorney, and to restrain the attorney from acting for the defendant in an action by the assignees of a bankrupt, on an affidavit by the defendant. The solicitor had formerly been the plaintiff's attorney and was dismissed by them; and that in that character, as appeared from his bill of costs, he had taken the opinion of counsel on all the facts of the case, had consulted with the bankrupt, had delivered the issue, drawn copies of the pleadings, and had given notice of trial; and as the deponents verily believed, was fully acquainted with all the facts and circumstances in the cause, and that his being employed by the defendant would injure the plaintiffs in the action.

The Court said, We cannot interfere unless it distinctly appears to be prejudicial to the plaintiffs.

* Money paid to the plaintiff's attorney suffices, unless it be shewn by the client it was received without his authority. (*Taunton*, J.—*Vorley* v. *Garrad*, E T. 1834, B. C., 2 D. P. C. 490). If the attorney of a party authorize A. to pay money for his client and A. pay it, and the attorney mention the matter to his client, who does not disclaim the transaction till several months after, this is evidence to go to the jury that the authority to pay was authorized by the client. (Lord *Abinger*, C. B.—*Parker* v. *Dubois*, M. T. 1835. N. P., 7 C. & P. 406).

The rule that all papers relating to the cause must be presumed to be put into the hands of the attorney, must be confined to the attornies of persons residing abroad, while the cause is going on in England, and does not apply to cases where the party is resident in England; and in no case does it extend to any but such papers as might be reasonably expected to be put into the hands of the attorney for the purpose of the cause. (Lord *Tenterden*, C. J.—*Vice* v. *Anson*, T. T. 1827, N. P., 3 C. & P. 19). Quære, Whether an attorney may lawfully guarantee the petitioning creditor against the expenses of working the commission of bankruptcy on condition of being employed as attorney in it? (*Gillett* v. *Rippen*, M. T. 1829, N. P., 1 M. & M. 406).

A. no party to an ejectment, and claiming no interest in the property, employed an attorney for the benefit of the lessor of the plaintiff, and furnished funds to carry on the suit. On motion to compel A. to pay the costs of the lessor of the plaintiff, the Court refused to interfere. *Williams*, J.—*Doe* d. *Wright* v. *Smith*, E. T. 1840, B. C., 8 D. P. C. 517).

GRISSELL *v.* PETO, T. T. 1832. C. P. 9 *Bing.* 1; S. C. 2 *M. & Scott*, 2.

And the Court will not restrain him on the ground of undue knowledge of plaintiff's case.

ON motion to restrain the defendant's attornies from acting in the cause, on the ground that they, acting for the defendant and for other parties, in a Chancery suit, had obtained a knowledge of the plaintiff's case, the defendant having had no interest in that suit. In answer to the application, the defendant's attornies deposed that they had not thereby obtained any more information respecting the plaintiff's case than would be afforded by a bill of particulars.

*Per Cur.*—The attornies deposed that in the Chancery suit they were concerned for the defendant, and that they have obtained little more information than would have been obtained by a bill of particulars in this action; and, as there is no misconduct alleged, the application to us at least appears premature, nor does it seem that any great advantage would accrue to the plaintiff if another attorney was substituted, for there is nothing to prevent the present attorney from communicating to him all the information he possesses.

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BERRY *v.* JENKINS, H. T. 1826. C. P. 3 *Bing.* 423; S. C. 11 *Moore*, 308.

But where an attorney acted for plaintiff and defendant at the same time, and signed interlocutory judgment, the Court ordered him to pay the costs.

THE plaintiff's attorney acted also as attorney for the defendant, and put in bail for him, and afterwards signed interlocutory judgment for the plaintiff. On motion that the proceedings be set aside, and the attorney to pay all the costs—

The Court said, that an attorney cannot act for both parties in a suit, or monopolize the whole of the proceedings. They therefore ordered the rule to be made absolute on the terms as prayed.

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SHIPDEM, *Ex parte*, T. T. 1825. K. B. 6 *D. & R.* 338.

Accounts between attorney and client will not be re-opened after seven years.

AFTER seven years had elapsed since accounts between an attorney and his client had been settled, a rule was obtained calling on the attorney to deliver up certain papers and writings, pay over certain sums of money alleged to be in his hands belonging to a client, and have his bill of costs referred to the Master to be taxed.

*Per Cur.*—After so long a time the party applying must point out some fraud in the transactions in order to induce the Court to interfere. Here no fraud or misconduct is suggested. More than seven years have elapsed since the transactions have been closed and adjusted, and the money paid over; and therefore we think we ought not to make the rule absolute.

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### 2. *As to confidential Communications.*

#### 1st.—*To what Kind the Rule applies**.

* Privileged communications only apply to bringing or defending an action. (*Abbott*, C. J.—*Williams* v. *Mudie*, H. T. 1824, N. P., 1 C. & P. 158; S. C. 1 R. & M. 34). And it seems that a communication not made for that purpose, or in a judicial proceeding, is not privileged. (*Best*, C. J.—*Broad* v. *Pitt*, T. T. 1828, N. P., 1 M. & Malk. 233; S. C. 3 C. & P. 518.) But the rule is no longer so limited. (Lord *Tenterden*, C. J.—*Clark* v. *Clark*, M. T. 1830, N. P., 2 M. & Rob. 3. See Post, 460, n.).

REX *v.* UPPER BODDINGTON, *M. T. 1826. K. B. 8 *D. & R.* 726.

If a client refuses to produce a deed in his possession, the attorney cannot give evidence of it*;

IN this case the question was, whether an attorney is allowed to give evidence of the contents of a deed in his client's possession, the client refusing to produce it.

*Per Cur.*—If a client refuses to produce his deeds the attorney would not be justified in giving evidence of their contents.

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PARKER *v.* YATES, T. T. 1827. C. P. 12 *Moore*, 520.

and an attorney who has received papers as such, cannot be called to produce them in a cause, though not the attorney therein.

IN replevin, to establish the tenantcy, the defendant called A. B., an attorney, who had formerly been employed professionally by the plaintiff in obtaining his discharge under the Insolvent Debtors' Act. He was called upon to produce a receipt given by the defendant to the plaintiff, for rent due in respect of the premises, which receipt he admitted to be in his possession, but stated that it had come into his hands in his character of attorney to the plaintiff. On the part of the plaintiff it was contended that the witness could not be called upon to produce anything that had come to his hands confidentially whilst acting as the professional adviser of the party.

And of that opinion was *Vaughan*, B., who reserved the point. And, on motion for a new trial, the Court concurred.

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WHEATLEY *v.* WILLIAMS, T. T. 1836. Ex. 1 *M. & W.* 533; S. C. 1 *Tyrw. & J.* 1043.

So, an attorney cannot prove a document to be unstamped where shewn to him in his ca-

ON the question whether a document was stamped at a certain time. The defendant called B., who had been the attorney of S., to prove that the paper was not stamped at the time of its execution. On examination, he stated that he first saw the paper as the attorney of S., and had never seen it in any other character than as

* Even to shew an act of bankruptcy. (*Tindal*, C. J.—*Nixon* v. *Mayoh*, Sp. Ass. 1831, N. P., 2 M. & Rob. 76).

And, in an action to recover back the deposit, on failure to make a good title:—Held, that communications made by the defendant to his attorney, in relation of the sale, could not be disclosed. (*Littledale* J.—*Mynn* v. *Joliffe*, H. T. 1834, N. P., 2 M. & Rob. 326). And, where a party is steward, and also an attorney, he is bound under a sub. duces tecum to produce documents which he holds as steward, but not those in his character of attorney. (Lord *Denman*, C. J. —*Rex* v. *Woodley*, Sum. Ass. 1834, N. P., 2 M. & Rob. 390). The attorney for the opposite party cannot be asked whether he has with him a rule of Court relating to the cause, with a view to give secondary evidence of the rule, no notice to produce under a subpoena duces tecum having been served. It is too late at the trial to serve such notice. (*Patteson*, J.—*Cook* v. *Hearn*, Sum. Ass. 1832, N. P., 2 M. & Rob. 201). The protection of communications made by a client to his attorney applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity. An attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or an unlawful purpose. (*Parke*, J.—*Doe* d. *Shellard* v. *Harris*, Sp. Ass. 1833, N. P., 5 C. & P. 592). A debtor being in prison wrote to the town agents of his creditor's attornies, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditor's claim:—Held, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter, was receivable in evidence. even though the subject-matter of the communication was an offer of 10*s.* in the pound. (*Parke*, J.—*Hill* v. *Elliott*, M. T. 1832, N. P., 5 C. & P. 436).

his attorney. It was objected that he could not now give testimony as to the state of the paper when he first saw it. The Judge was of that opinion, and refused to allow him to give evidence on that point. On the point coming before the Court— pacity as attorney.

*Per* Lord *Abinger*, C. B.—It could not be intended that where an attorney, being consulted by his client, obtains information concerning some collateral matter which he would never otherwise have known, he is allowed to divulge it. If I employ an attorney to search for papers in my desk, and he finds there some deed detrimental to my interests, he cannot afterwards give an account of it. Whatever may have been the subject on which the attorney was consulted, if the note was communicated to him, all that is on the face of that note is privileged.

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TURQUAND *v.* KNIGHT, M. T. 1836. Ex. 1 *M. & W.* 98.

IN trover, by assignees, to recover a lease alleged to have been brought to the witness, an attorney, for the purpose of raising money. It was then proposed to ask him whether the bankrupt had not the lease in question in his possession at that time. It was objected, that having been the attorney for the bankrupt, he could not be allowed to answer that question. The learned Judge determined in favour of the objection, and the evidence was rejected. And in trover, by the assignees of a bankrupt, the bankrupt's attorney is not bound to state the purpose for which a lease was deposited with him.

*Per Cur.*—A motion was made in this case for a new trial, on the ground of the rejection of evidence. The Court were at the time strongly inclined to hold that the evidence had been improperly rejected. We have since examined the authorities on this subject, especially the case of *Greenough* v. *Gaskell*, 1 Mylne & K. 98, where Lord *Brougham* went through all the cases, and the weight of authority is in favour of the rejection of the evidence. As to the point of the witness being a scrivener, Lord *Nottingham*, 2 Swanst. 221, laid it down that he would not compel a scrivener to disclose the communication made to him.

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RIPON *v.* DAVIES, M. T. 1833. K. B. 2 *N. & M.* 310.

ACTION for fees as attorney. In order to shew the work done, the plaintiff called a person who had been the attorney of the defendant, to give evidence of a statement made by himself to the adverse party, by the direction of his client. But, a statement made by an attorney by the direction of his client, to the adverse party, is not privileged*.

*Per Cur.*—There is no pretence for saying that this was a communication, which falls within the rule respecting privileged communications. This was an open communication made by one party to a suit to the other, and not a private communication made by the client to his attorney.

* So, an attorney is bound to state who is his employer, so as to let in his acts and declaration. (*Parke*, J.—*Levy* v. *Pope*, M. T. 1829, N. P., 1 M. & Malk. 410).

So, where the defendant's attorney being called to prove his handwriting, refused, on the ground that he was only acquainted with it from having seen him sign a bailbond:—Held, not to be a privileged communication. (*Abbott*, C. J.—*Hurd* v. *Moring*, T. T. 1824, N. P., 1 C. & P. 372). And the solicitor, under a commission of bankruptcy against annuity brokers, who have laid out and expended money on an insufficient security, is bound in an action against the brokers to produce their books, under a subpœna duces tecum. (Lord *Gifford*, C. J.—*Hawkins* v. *Howard*, H. T. 1824, N. P., 1 C. & P. 222; S. C., R. & M. 64). So, in *Bevan* v. *Waters*, T. T. 1828, N. P., 1 M. & Malk. 235; S. C., 3 C. & P. 520, it was held, by *Best*, C. J., that an attorney might be asked if he has not a letter of which notice has been given to produce, in order to let in secondary evidence.

GRIFFITH *v.* DAVIES, M. T. 1833. K. B. 5 *B. & Ad.* 502.

And a defendant's attorney may be called by plaintiff as a witness as to a compromise*.

IT became a question whether or not the plaintiff had been employed by the defendant. To prove the retainer by the defendant, a witness, also an attorney, was called, who stated that after the business in question had been done, he, as the then attorney of defendant, went with him to the plaintiff, and on that occasion heard a conversation between them respecting a proposed compromise of the plaintiff's demand.

*Denman*, C. J., admitted his evidence. And, on motion for a new trial, the Court said, this is not a confidential disclosure but an open communication from one adversary to another, witnessed by the attorney of one party.

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COCKS *v.* NASH, E. T. 1833. C. P. 3 *M. & Scott*, 164; S. C. 9 *Bing.* 723.

The Court will not order production of a deed which has not come into an attorney's hands strictly as such.

ON the motion of the defendant to order a third person, a stranger to the suit, to produce upon the trial a certain deed, to which the defendant is not a party, and which he, the third person, holds as trustee for many others.

The Court refused it, saying, the Court exercises its summary jurisdiction, and compels an attorney to produce a deed or document, unless such deed or document come into his possession by virtue and in consequence of his character as attorney for the party applying for its production, or one claiming through such party.

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2nd.—*As to the Attorney's Clerk or his Agent*†.

GILLARD *v.* BATES, E. T. 1840. Ex. 6 *M. & W.* 547; S. C. 8 *D. P. C.* 774.

A mere statement to the agent of the attorney, also an attorney, as to the introduction of a client, as to the retainer, is not a privileged communication.

IN an action for work and labour, by an attorney, for the costs and charges in issuing execution against C. The defence was, that the plaintiff was retained and employed by A. B., and not the defendant. The plaintiff's agent, an attorney, being called as a witness, was asked whether the plaintiff had not said, on introducing A. B. to him, that he, the plaintiff, had been employed by A. B. to issue the execution. It was contended, that this question should not be answered, being a privileged communication. But *Rolfe*, B., overruled the objection. On motion for a new trial,

*Per Cur.*—A statement with reference to a mere introduction cannot be privileged. The test is, whether the communication be

* The rule as to privileged communications does not apply to what a mortgagor in treaty says to the attorney of the mortgagee. (*Patteson*, J.—*Marston* v. *Downes*, Sp. Ass. 1834, N. P., 6 C. & P. 381).

† The rule as to privileged communications extends to the attorney's clerk. (*Best*, C. J.—*Taylor* v. *Forster*, M. T. 1825, N. P., 2 C. & P. 195). In fact, there is no difference between the attorney and his clerk, where the clerk has the management of a cause. (*Denman*, C. J.—*Standage* v. *Creighton*, M. T. 1832, N. P., 5 C. & P. 406). Hence, communications made to an attorney's clerk before bankruptcy are privileged even against the assignee. (*Tindal*, C. J.—*Bowman* v. *Norton*, M. T. 1831, N. P., 5 C. & P. 177). But an attorney's clerk may be called to prove the receipt of a particular document. (Lord *Tenterden*, C. J.—*Eicke* v. *Nokes*, H. T. 1829, N. P., 1 M. & Malk. 303). So, an articled clerk is not privileged as to statements by his master during the time of his clerkship, as to matters not specially intrusted to him, nor affecting the interest of any of his clients. (*Littledale*, J.—*Webb* v. *Smith*, T. T. 1824, N. P., 1 C. & P. 337).

necessary for the purpose of carrying on the business in which the attorney is engaged. If it be not it is not privileged.

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3rd.—*When concerned for several.*

DOE *d.* PETER *v.* WATKINS, H. T. 1837. C. P. 3 *Bing. N. S.* 421; S. C. 4 *Scott*, 155.

If an attorney acts for the lender and borrower, he cannot disclose communications made by the latter*.

IN ejectment, it appeared that one C., a solicitor, who was in the habit of negotiating loans upon mortgage, was applied to by A. B., who said she came to him on behalf of her husband, for the purpose of raising money on certain property, which she represented that her husband had an interest in. C. D. told her he must see an abstract of the title, whereupon A. B. referred him to E. F., an attorney, who, on C. D's. application, handed over to him the abstract in question, which C. D. compared with the original deeds, in the possession of the present defendant. C. D. ultimately declined to advance the money, and returned the abstract to A. B. The defendant failing to produce the original deeds, after notice, the lessors of the plaintiff sought to make the abstract secondary evidence of their contents, and C. D. was called to identify it. It was submitted, on the part of the defendant, that the communication to C. D. being confidential, he could not be permitted to use it to the prejudice of the party.

*Sed per Cur.*—It appears that there was but one professional adviser in the transaction, and there is nothing unusual in the same attorney acting both for mortgagor and mortgagee. An attorney so employed clearly had no right to disclose the communications thus made to him.

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DOE *d.* STRODE *v.* SEATON, M. T. 1834. K. B. 4 *N. & M.* 81; S. C. 2 *A. & E.* 171.

Even though another attorney framed the draft for the vendee; held, that the former attorney could not produce the draft against the consent of a party claiming under the dee.

IN ejectment, the plaintiff having entitled himself to give secondary evidence called upon an attorney to produce the draft of a deed of 1802, by which the term had been assigned by Hall to Weekes, and which deed recited a lease of 1796, and the mode of reservation of the defendant. This draft had been prepared by P., who was the attorney of Hall, but who was on this occasion employed and paid by Hall and Weekes jointly. Osborne, the attorney of Weekes, was employed by him to peruse the draft, and the draft was sent to him by P. and returned. P. did not object to produce the draft, but the defendant's counsel objected to his being allowed to do so on the ground of privilege on the part of his client, Hall. This objection was held good by Lord *Denman*, C. J., who refused to allow the draft to be read.

*Per Cur.*—It is said, that that was not a privileged deposit with P. It is not necessary to say, whether it was privileged or not, except in one respect. We have always understood it to be a clear rule of law that a party is not bound to produce any deed in which he has an interest, and if he refuses to produce it he is only exercising a power which the law gives him. It appears to us that this

* But where parties have one common attorney, a communication by one not in his single character is not privileged. (*Baugh* v. *Craddocke*, E. T. 1832, N.P., 1 M. & Rob. 182—S. P. *Cleve* v. *Powel*, M. T. 1832, N. P., 1 M. & Rob. 228).

deed, having been prepared by P. for the vendor, as well as for the vendee, as the joint agent of both, each had an interest in it, and it could not be produced without the consent of both.

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4th.—*Effect of, when disclosed.*

MARSTON *v.* DOWNES, E. T. 1834. K. B. 1 *A. & E.* 31; S. C. 6 *C. & P.* 381.

A privileged communication, when disclosed is evidence.

ON the issue of assets in hand, and proof, by defendants, of payments to the amount of assets proved, the plaintiff called a witness who was an attorney, to prove payment of a large sum of £—— since the testator's death, which had been raised on mortgage, to one of witness's clients. The witness, having been served with a subpœna duces tecum, had the mortgage deed in Court, but refused to produce it; and, upon his asking the learned Judge whether he ought to state the contents of it, and upon the Judge's decision that he ought,

The Court held, that although his client might have claimed the privilege of their not being disclosed, yet, when disclosed, the defendant could not object, even supposing the Judge's directions erroneous.

## VIII. OF THE SERVICE OF RULES, &c.* See also Div. III. *Duties of.*

## IX. LIABILITIES OF.

### (*a*) TO AN ACTION FOR NEGLIGENCE.

1. *When maintainable.*

GODEFROY *v.* DALTON, H. T. 1830. C. P. 6 *Bing.* 460; S. C. 4 *M. & P.* 149.

An attorney is personally liable where the law presumes him to have the requisite knowledge himself, and it is no defence to say he consulted others.

IN an action against an attorney for negligence in conducting the defence of the plaintiff in a former action, the declaration alleged, that by reason and in consequence of the negligence of the attorney, judgment by default had been signed, and such further proceedings had that final judgment afterwards signed and execution issued against the plaintiff.

The Court held, 1st, That there must be gross negligence to render the defendant liable; and, 2nd, That his liability would not be altered by his shewing that he had consulted others, but must depend on the nature of the mistake, where the law presumes him to have the requisite knowledge himself.

* To authorize the service of a rule at the last place of abode, it must appear to be the residence stated in the book kept for that purpose, or that no entry is made at all. (*Patteson, J.—Sandys, In re*, E. T. 1832, B. C., 1 D. P. C. 362). Service of a rule on a laundress, at an attorney's office, though she states that she is authorized to receive papers, will not do. (*Taunton, J.—Dodd* v. *Drummond*, E. T. 1832, B. C., 1 D. P. C. 381).

† But, an attorney is not liable for every mistake or misapprehension, the question being whether he has used proper skill and care. (*Shilcock* v. *Passman*, 1836, N. P., 7 C. & P. 287).

STANNARD *v.* ULLITHORNE, T. T. 1834. C. P. 10 *Bing.* 491; S. C. 4 *M. & Scott*, 359.

Hence, an attorney is liable for negligence if he permits his client to execute an unusual covenant;

VENDOR possessed of a term of years, each undivided moiety of which was determinable upon a life, assigned the term, with an unqualified covenant for quiet enjoyment to a third person. At the time of the making of the assignment, one of the lives had died, to the knowledge of the defendant, acting as attorney on the occasion; consequently, the vendor's title as to one moiety had determined. The vendee having been ejected and having recovered damages from the plaintiff for the eviction, the plaintiff sued the defendant, the attorney who prepared the assignment, &c., for negligence.

The Court held, that, as the covenant was unusual, the defendant was liable for the result of such negligence, although his client as well as himself were aware that the plaintiff's interest in the premises, as to a moiety, had determined by the death of a party.

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IRESON *v.* PEARMAN, H. T. 1825. K. B. 3 *B. & C.* 799; S. C. 5 *D. & R.* 687.

so, an attorney, by deciding on an abstract of title of sixty-five sheets, that a party named in it had an estate in fee, when he had not.

IN an action against an attorney for negligence, it appeared that an abstract of title, containing sixty-five sheets, had been laid before the defendant, which shewed that an estate had been conveyed to the use of M. and C. as joint tenants for life, remainder in fee to M.; and M. devised the estate to his daughter in tail, with remainder over, in default of issue. The daughter, after M.'s death, and in the lifetime of C. suffered a recovery without the concurrence of the tenant for life, and subsequently conveyed the same, in trust for herself and husband and their issue; and in default of issue, as she should appoint; she afterwards devised the same to her husband in fee, who had contracted for the sale thereof. The defendant, who had stated the case for the opinion of counsel on the title, assumed that M. was tenant in fee, instead of setting out the deeds which would have shewn the estate for life in C., in consequence of which the purchaser was obliged to pay a sum of money to the devisee in remainder, for a confirmation of his title. The jury found a verdict against the attorney. On motion to set it aside—

The Court held, That the defendant, in omitting to state the deeds, but erroneously drawing his own conclusion as to their effect, was guilty of negligence sufficient to render him liable.

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FRANKLAND *v.* COLE, T. T. 1832. Ex. 2 *C. & J.* 590.

Or, in a suit in equity, suffering an order to exist which ought to be vacated, renders him liable to an action for negligence*.

THE defendants, in pursuance of the printed orders in Chancery, but before the time allowed by a subsisting order not contained therein, moved to dismiss the plaintiff's bill, and obtained thereon an order to go to commission in the ensuing vacation, and gave rules to pass publication in the next term; and the plaintiff's solicitor omitted to give rules to pass publication within the time required, and did not move to vacate the order; whereby the bill was dismissed:—

The Court held, That the solicitor was liable to the plaintiff for

* So an attorney who pays his client's money indiscriminately into his banker's, without distinguishing it from his own, is personally liable if the banker fails. (*Abbott*, C. J.—*Robinson* v. *Ward*, T. T. 1825, N. P., 2 C. & P. 59; S. C. 1 Ry. & M. 274).

the costs incurred by him in respect of such bill, as well as the costs occasioned by two subsequent motions to restore the same.

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WILLIAMS *v.* GIBBS, T. T. 1836. K. B. 5 *A. & E.* 208; S. C. 6 *N. & M.* 788.

So, an attorney who prosecutes a plaint without proper evidence is guilty of negligence.

IN an action for negligence, committed in conducting a cause in an inferior Court, it appeared that the cause came on for trial in that Court: that the debt, which the plaintiff came prepared to prove, was upon a score run up for beer at Swansea, out of the jurisdiction of the Manor Court; and that on the objection being taken that no cause of action could be proved within the jurisdiction, the plaintiff submitted to a nonsuit.

*Per Cur.*—It is plain to us, that there was clearly a case of negligence, having commenced the action in a Court where the plaintiff could have no chance of success; inasmuch as where a suit is commenced in an inferior Court, not only the promise must have been made, but the cause of action must have arisen within the jurisdiction.

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TAYLOR *v.* BLACKLOW, M. T. 1836. C. P. 3 *Bing. N. S.* 235; S. C. 3 *Scott*, 614.

So, an action lies against an attorney for a gross breach of duty, such as disclosing defects in his client's title to the vendee.

THE defendant being employed to raise money for the plaintiff, on mortgage, disclosed defects of title, whereby plaintiff was put to expense by actions brought by the proposed lender, and delayed in obtaining the loan, and obliged to pay higher interest. In an action against the defendant, the attorney, for such breach of duty—

*Per Cur.*—It cannot be denied, the undoubted, unquestioned duty of an attorney to keep secret that which is intrusted to him, and not to divulge it to others. In this case certain deeds were placed in the hands of the party for the purpose of raising money upon them, which was to be furnished by another client; and certainly the person who confided his abstracts to him, could not be prepared to expect that he, the attorney, would have communicated the contents of such abstracts to another, and, least of all, to one who might derive benefit from the defects which, as it was alleged, may be ascribed to the documents in question. It undoubtedly may happen, that, in case of conflict between two clients, the minds of some persons, acting as attornies, may not be sufficiently strong to enable them to steer an equal course; but yet, a person placed in such circumstances has an easy path to pursue. He should keep his lips sealed with the solemn seal of silence to the last moment of his life—he should never communicate—he should never divulge—he should keep buried in his breast that of which he has obtained the knowledge in the exercise and discharge of his profession. Instead, however, of acting thus—instead of retaining that which was intrusted to him with the greatest possible secrecy, and of confining it strictly to himself—the defendant has thought proper to make disclosures, the consequences of which have been actions at law, and bills in equity, and which, inasmuch as they have been the cause of temporal injury, should be the groundwork of an action.

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WILMOTT *v.* ELKINGTON, M. T. 1833. K. B. 1 *N. & M.* 749.

So, if an attorney who re-

IN assumpsit, the declaration stated that the plaintiff, who was an attorney, agreed to pay 100*l.*, in consequence of deeds having been

mislaid; and the defendant agreed to return the 100*l.*, and interest, if it should afterwards be proved that the deeds had not been mislaid by the plaintiff, or by any person employed by him: Breach—that the defendant had not returned the 100*l.* At the trial, it appeared that the deeds had not been produced by the plaintiff. *Denman*, C. J., told the jury, that the plaintiff, an attorney, ought to have been able to inform the defendant where the deeds were deposited. The jury found for the defendant. On motion for a new trial—

The Court held, that the plaintiff's want of knowledge where the deeds were, was evidence of negligence, and that he ought to have been able to inform the defendant what had become of the deeds, and refused the rule.

ceives deeds to raise money on, cannot inform his client where they are, he is liable to an action for negligence.

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LAIDLER *v.* ELLIOTT, H. T. 1825. K. B. 3 *B. & C.* 738; S. C. 5 *D. & R.* 635—S. P. KEMP *v.* BURT, H. T. 1833. K. B. 1 *N. & M.* 262; S. C. 4 *B. & Ad.* 424.

FINAL judgment was obtained against a man, as of Hilary Term, 3 & 4 Geo. 3, the essoign day of Easter Term was on the 13th April. On the 12th April, he rendered to prison, in discharge of his bail, as of Hilary Term, but did not give notice of it until the 14th. A few days after Easter Term, he was discharged out of custody, by the order of a Judge, under the rule of Court, of Hilary Term, 26 Geo. 3, by which it is ordered that a prisoner must be charged in execution within two terms. An action was brought against the attorney for negligence, in not charging him in execution.

The Court held, that an attorney was not liable to an action for negligence in misconstruing the rule of Court.

But misconstruing an obscure rule of Court does not render an attorney liable to an action for negligence*.

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KEMP *v.* BURT, H. T. 1833. K. B. 4 *B. & Ad.* 424.

IN an action against attornies for negligence, it appeared that the plaintiff employed the defendants to conduct an action for him against a surveyor of turnpike roads, for alleged trespasses. The surveyor had seized and impounded plaintiff's sheep, as having been found straying on the road. The plaintiff regained possession of them by promising the pound-keeper to pay the proper charges, and drove them home. On the same day the surveyor re-took the sheep in the plaintiff's fields, and again impounded them. The first and second taking were in Surrey, but on an intermediate day the sheep had escaped, and been impounded in Sussex. The Turnpike Act, 4 Geo. 4, c. 95, s. 75, only authorizes surveyors to impound sheep found on a turnpike road. The general Turnpike Act, 3 Geo. 4, c. 126, s. 147, incorporated in the above statute, by reference, requires that actions against any person, for anything done in pursuance of the act, shall be commenced within three months, and the venue laid in the county where the cause of action arose.

Nor is he liable where the negligence complained of is under the advice of counsel.

* Nor is an attorney answerable for the absence of counsel, and a cause being struck out whilst he is in search of them, is not negligence. (*Taunton*, J.—*Lowry*, v. *Guilford*, E. T. 1832, N. P., 5 C. & P. 234). Nor for not having ascertained whether the opposite party's attorney was authorized to refer a cause and other matters to an arbitrator. (*Park*, J.—*Edwards* v. *Cooper*, H. T. 1828, N. P., 3 C. & P. 277).

The attornies, the defendants, commenced the action within three months, and had a declaration drawn by counsel, who returned it, with an observation, indorsed, that it would have been prudent to join two other parties. The attornies, thereupon, with the plaintiff's assent, discontinued the action, and brought another after the expiration of the three months, laying the venue in Sussex. The declaration was settled by counsel, and the case afterwards submitted to a special pleader, who gave, as his opinion, that the protecting clause of 3 Geo. 4, c. 126, did not apply to the trespass in seizing the sheep in the plaintiff's field. The plaintiff went to trial and was nonsuited on account of the action being out of time, and the venue improper, with leave to move, which was done without success.

Held, that this was not a case of actionable negligence in the attornies.

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2. *By whom maintainable.*

DELAFIELD *v.* FREEMAN, M. T. 1829. C. P. 3 *M. & P.* 704.

Whether an attorney is liable for negligence, at the suit of the assignees of insolvent, is not decided.

THIS was an action against the defendants, who were attornies, for negligence, in preparing a lease for the insolvent, whereby property, which the insolvent would otherwise have obtained under the lease, was lost to the estate, by reason of the lessor not being in a situation to grant a lease. The defendant pleaded the general issue. At the trial before Lord Chief Justice *Tindal*, the plaintiff was nonsuited on a point of evidence. On motion for a new trial—

*Per Cur.*—Whether the injury, of which the plaintiff complains, is of such a nature as to give a right of action to an assignee, we give no opinion. The cause is not ripe for the discussion. We think the plaintiff ought to have an opportunity of trying his cause again.

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3. *Against whom maintainable*.*

4. *Declaration.*

DARTNALL *v.* HOWARD, T. T. 1825. K. B. 4 *B. & C.* 345; S. C. 6 *D. & R.* 438.

Declaration against an attorney for negligence, must shew he was employed in that character, in order to make him responsible for want of skill.

AFTER verdict in an action against defendants for negligence, in laying out money in an annuity, upon insufficient securities, it appeared that the third count only stated, that, in consideration that defendants had been retained, (not saying for any reward, nor alleging them to be attornies), they undertook to perform their duty in the premises; averring, as a breach, that, on the contrary, they laid out the same on a security wholly insufficient, and of no value whatever. On motion in arrest of judgment—

The Court held it bad, for it did not state that the defendants were employed by the plaintiff in any particular character, e. g. as attornies, so as to make them responsible for want of skill in taking a bad security, though not guilty of neglect or dishonesty; nor, secondly, did it state that any reward was to be paid to them on such retainer.

* Where a London attorney is agent to a country attorney, if the former improperly receives money, the client's remedy is against the latter and not the former. (*Patteson*, J.—*Gray* v. *Kirby*, T. T. 1834, B. C., 2 D. P. C. 601).

5. *Pleas**.

WRIGHT *v.* NENTON, M. T. 1836. C. P. 3 *Scott*, 595.

In an action for negligence, the defendant may plead non assumpsit, and that the security might have been enforced.

To an action against an attorney for negligence, in procuring insufficient security upon an advance of money, per quod the plaintiff lost the money, the defendant pleaded non assumpsit, and amongst other pleas; the Judge, at Chambers, refused to allow a plea, or denial of the allegation, that the plaintiff had been prevented from enforcing payment of the money advanced. On motion to the Court for that purpose—

The Court allowed the plea to be pleaded.

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6. *Evidence.*

GODEFROY *v.* JAY, H. T. 1828. C. P. 1 *M. & P.* 236; S. C. 3 *C. & P.* 192.

In an action against an attorney for negligence in suffering judgment by default, the judgment must be proved;

IN an action on the case, against an attorney, for negligence, for not duly moving to set aside the proceedings for defect of service, "in consequence whereof judgment by default had been signed against, and final judgment and execution obtained thereon,"

The Court held, that he was bound to prove that the judgment signed against him had been completed, and the judgment roll carried in; and such judgment, at all events, should be proved by production of an examined copy of the record.

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GODFREY *v.* JAY, E.T. 1831. C. P. 7 *Bing.* 413; S. C. 5 *M. & P.* 284.

but the plaintiff is not bound to shew he had a defence.

IN an action against an attorney, for negligence in conducting the defence of a suit against plaintiff—

The Court held, that it was not necessary to shew special damage, in order to entitle the plaintiff to a verdict, nor was he bound to shew that he had a good defence; but that it was for the attorney to shew, if he could, there was no defence.

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(*b*) TO AN ACTION FOR ACTING AS TOWN CLERK.

FAULKNER *v.* CHEVELL, E. T. 1839. K. B. 2 *P. & D.* 262.

An attorney is not liable to penalties under 22 Geo. 2†, for

IN an action of debt, on the stat. 22 Geo. 2, c. 46, for penalties, for practising as an attorney at sessions where the defendant held the office of deputy-clerk of the peace. The declaration alleged

* To an action against an attorney for negligence in not taking the proper measures and using due diligence in obtaining the plaintiff's discharge out of custody, defendant pleaded that he did take, &c.:—Held, that prefatory allegations in the declaration were admitted. (*Shilcock* v. *Passman*, 1836, N. P., 7 C. & P. 289).

† Cap. 46, s. 14, which provides, "And to the end that justice may be impartially administered in the several General or Quarter Sessions of this kingdom, be it further enacted, by the authority aforesaid, that no clerk of the peace, or his deputy, nor any under-sheriff or his deputy, shall, from and after the said 29th day of September, act as a solicitor, attorney, or agent, or sue out any process at any General or Quarter Sessions of the Peace to be held for such county, riding, division, city, town corporate, or other place within this kingdom, where he shall execute the office of clerk of the peace or deputy-clerk of the peace, under-

acting as deputy town-clerk unless it be proved he acted as such.

that one A. B., before the committing of the grievances by the defendant, was clerk of the peace for the town of Cambridge, and that the defendant was the deputy of A. B., so being such clerk of the peace. It then stated, that the defendant, so being such deputy on the 30th June, 1834, at the General Quarter Sessions of the Peace, holden at Cambridge, in and for the town, being the town where the defendant executed his office of such deputy, acted and presumed to act, as an attorney for C. D., by managing and conducting a certain indictment for felony at such Sessions. The only question left by the Judge to the jury, was, whether the defendant had, in point of fact, ever acted as clerk of the peace. The jury found, that he had not, whereupon the plaintiff was nonsuited. On motion to set it aside—

*Per Cur.*—In this case it is necessary to prove that the defendant not only held the office, but that he acted in it. Now, assuming, which we do not admit to be the fact, that he held the office, there is no proof that he acted in it. If it is true that the act of the deputy is the act of the principal, it is not true that the act of the principal is the act of the deputy. On the contrary, the act of the principal rather excludes that of the deputy. The nonsuit was right.

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### (*c*) To an action on contracts, express or implied.

Bates *v.* Sturges, M. T. 1831. C. P. 2 *M. & Scott*, 172.

A promise after trial by an attorney to pay a witness all he should be allowed on taxation, is void.

On motion for an attachment against an attorney for non-payment of expenses incurred by a witness in coming up from the country, it appeared that he had promised to pay to the witness so much as the prothonotary should allow on taxation of the plaintiff's bill of costs, and that 10*l.* had been allowed.

*Per Cur.*—We cannot grant the attachment. The promise was made after the cause was tried. If the promise had been shewn to have been made before, so as to induce the attendance of the witness, the case might have been different. The promise was a mere nudum pactum without consideration. We cannot grant relief on motion when the party would be unable to obtain it by an action.

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Lewis *v.* Knight, H. T. 1832. C. P. 1 *M. & Scott*, 353; S. C. 8 *Bing.* 271; S. C. 1 *D. P. C.* 261.

An attorney undertaking to give a bail-bond to the sheriff, is void under 23 Hen. 6, c. 10.

In this case the attorney for the defendant gave an undertaking to the Sheriff to put in bail. On motion to cancel the undertaking, and that an appearance might be filed, it was contended, that an undertaking of an attorney to give a bail-bond in due time, is contrary to the statute 23 Hen. 6, c. 10—

And the Court said, there was no means of confirming the undertaking; it was illegal and void. The defendant has given no bail-bond. She has never been brought into Court. How then are we to enter an appearance for her?

sheriff or deputy, on any pretence whatsoever; but if any clerk of the peace or his deputy, or any under-sheriff or his deputy, shall presume to act as a solicitor, attorney, or agent, as aforesaid, such clerk of the peace or his deputy, under-sheriff or his deputy, respectively, shall be subject and liable to a like penalty of 50*l.*, to be recovered in manner aforesaid."

ROBINS *v.* BRIDGE, M. T. 1837. Ex. 3 *M. & W.* 114; S. C. 6 *D. P. C.* 140.

So an attorney who subpœnas witnesses, is not personally liable to them for their expenses*.

IN an action against the defendant, who had acted as attorney in a cause—*House* v. *Leaky*, to recover from him, amongst other demands, the expenses of the plaintiff's testator, as a witness in that cause, a verdict passed for the plaintiff, with leave given to the defendant to move to enter a nonsuit, on the ground that he was only the agent and attorney for Leaky in the original action, and had not made himself personally responsible.

*Per Cur.*—There is no implied contract by the attorney to pay the witness; the attorney is known merely as the agent, the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words. He does not make himself liable for anything, unless it is for those charges which he is himself bound to pay.

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FENDALL *v.* NOKES, T. T. 1839. C. P. 7 *Scott*, 647.

Nor does the mere fact of his being the attorney on record, render him liable for refreshments furnished to witnesses at a coffee-house.

THE defendant was an attorney in the cause of "A. B. *v.* C. D." in action of assumpsit by the plaintiff, an innkeeper, for refreshments supplied to his witnesses while attending the trial. There was contradictory evidence as to whether or not the defendant himself, (who it was admitted was attorney for the plaintiff in the cause), was at the hotel; but it was proved that his clerk was there several times in the course of the day and partook of refreshments. *Bosanquet*, J., left it to the jury to say whether the defendant had by his conduct so sanctioned the supplies to the witnesses, as to pledge his credit for them. The jury found for the plaintiff. On motion to set aside the verdict—

*Per Cur.*—To entitle the plaintiff to succeed in this action, it was incumbent on him to shew, either that the defendant expressly authorised the supply of refreshments to the witnesses, or that he so conducted himself as to warrant the jury in implying that he was conscious the credit was given to him.

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FOSTER *v.* BLAKELOCK, E. T. 1826. K. B. 5 *B. & C.* 328.

If an attorney employs a sheriff's officer, he is liable to pay such compensation as is usually paid on such occasions.

ASSUMPSIT for work and labour performed by the plaintiff, as a sheriff's officer, for the defendant's testator, who was an attorney, in making arrests of divers persons at his instance and request, in conveying divers of those persons to prison, and also for poundage due, in respect of divers captions and levies, upon writs of execution. The plaintiff had a verdict. On motion to set it aside—

*Per Cur.*—The case might have been different if the writs had merely been delivered to the sheriff himself, leaving him to execute them how and by what officer he pleased. The general usage and understanding was, that if you employ an officer of your own choosing, you should pay him according to the usual scale, without reference to any act of Parliament. There was no act of Parliament to abridge the allowance where the officer is employed by the party.

* An attorney is liable on his I O U, given to a witness after trial for his expenses and loss of time. (*Gurney*, B.—*Evans* v. *Phillpotts*, 1840, N. P., 9 C. & P. 270).

The statute of Hen. 6, applied to the sums which were to be paid by defendants to sheriffs on giving bail, and not to any compensation which should be paid by the plaintiff to the officer. Then, as to the attorney, he is generally, as he was in the present case, the actual employer of the officer, the bailiff looked to him as his employer, and not to the parties, to whom he was probably unknown, and by whom he might not choose to be employed.

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### (*d*) To an action for a libel*.

SPARLING *v.* HADDON, T. T. 1832. C. P. 9 *Bing.* 11; S. C. 2 *M. & Scott*, 14.

The Stamp Office certificate, countersigned by one of the Masters of the Court, is primâ facie evidence of his being an attorney in an action for a libel.

IN an action for a libel the plaintiff alleged that he was an attorney of the Court of King's Bench. In proof of that allegation, the plaintiff produced the Stamp Office certificate of his having paid the annual duty imposed upon attornies by 37 Geo. 3, c. 9, which certificate was countersigned by a Master of the Court of King's Bench, as having been duly entered, and a witness proved the signature of the Master.

*Per Cur.*—In this case, there was no evidence of the plaintiff's having acted as attorney in actions in the Court of King's Bench: the evidence relied on was, his having taken out the usual annual certificate at the Stamp Office, and that such certificate had been countersigned by a Master of the Court of King's Bench. There was also further proof that the plaintiff who had signed as such was the Master, and that the signature was his handwriting. Under these circumstances we think there is sufficient primâ facie evidence to satisfy the allegation in the plaintiff's declaration.

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### (*e*) For false representations.

HEWITT *v.* MELTON, T. T. 1834. Ex. 1 *C., M., & R.* 232; S. C. 4 *Tyrw.* 1003.

No action lies against an attorney for a false representation that his client has consented to a particular thing, when the document is in itself invalid.

A PLAINTIFF'S attorney being about to charge a defendant in execution, agreed to forbear to do so until the following term, at the request of the defendant's attorney, who falsely represented that he had the authority of the defendant to consent to the arrangement, and who drew up, signed, and delivered to the plaintiff's attorney an agreement.

*Per Cur.*—It has been contended that the agreement not to proceed to charge the father of the defendant in execution, was obtained by the representation of the defendant that he would go and obtain his consent, and that he had obtained it. But there was still something further to be done, as it was necessary to prevent a supersedeas. This agreement did not state that the proceedings were stayed at the request of the defendant according to rule Trinity Term, 26 & 27 Geo. 2, in consequence of which, the defendant obtained his discharge on the ground that he had not been charged in

* The attorney of a party claiming title to premises put up for sale is not liable to an action for slander of title, if he bonâ fide, though without authority, makes such objections to the seller's title as his principal would have been authorized in making. (*Littledale, J.—Watson* v. *Reynolds*, M. T. 1826, N. P., M. & M. 1).

execution in time. In an action by the plaintiff against the defendant's attorney for the false representation it must appear that a proper document was prepared, and plaintiff's attorney ought to have taken care that the document given was correct: he did not; and in consequence of the informality in the document, and not through the false representation of the defendant, the defendant's father was discharged. This action cannot be maintained.

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### (*f*) On process issued by him.

Codrington *v.* Lloyd, T. T. 1838. Q. B. 3 *N. & P.* 442; S. C. reported 8 *Ad. & El.* 449, H. T. 1839.

Trespass lies against an attorney by a defendant arrested on a ca. sa. which has been set aside; and if the attorney justify under the process, it may be replied, it was set aside.

To an action of trespass against an attorney, he pleaded that he was an attorney of the Court of Exchequer, and that the plaintiff being indebted to F. P. for the recovery of the debt, retained defendant to sue out an alias capias for him against plaintiff; whereupon defendant as F. P.'s attorney in that behalf, sued out of the Exchequer a writ of alias capias against plaintiff, upon which writ plaintiff was arrested by the said sheriff and imprisoned, &c. To which plaintiff replied, that the process was irregularly sued out, and was afterwards set aside by rule of Court for irregularity. On demurrer—

*Per Cur.*—The foundation of the action of trespass is the taking without authority. There is no distinction between the party and the attorney. The plaintiff here was arrested on a writ which was afterwards declared by the Court irregular; it was therefore, as if there had been none. Then is the attorney liable in this action for the arrest? A similar question was very fully discussed in *Barker* v. *Braham*, 3 Wils. Rep. 368, and the attorney was held liable as well as the client; and in *Bates* v. *Pilling*, post, p. 474, no doubt was entertained that if the action lay against the principal, it lay also against the attorney. Indeed, there is a stronger reason for holding the attorney liable, since the party cannot be expected to know whether the process is regular in point of law of not.

*See Riddell* v. *Paterson*, 2 *C., M., & R.* 30.

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Crozer *v.* Pilling *and Another*, E. T. 1825. K. B. 4 *B. & C.* 26; S. C. 6 *D. & R.* 129.

Case lies against an attorney and his client, who agree to refuse the debt and costs from a defendant in custody on a ca. sa*.

In an action on the case, the declaration stated, that the defendants had sued out a ca. sa. indorsed to levy 32*l.*, besides poundage, that the sheriff arrested the plaintiff, and the plaintiff being in custody tendered and offered to pay to the defendant Pilling, by the hand of the defendant Moore, as his attorney, the sum indorsed on the writ, together with poundage and lawful expenses, yet the defendants refused to accept the money tendered, and did not instruct the sheriff that the defendant Pilling was satisfied of his damages, &c.

The plaintiff had a verdict. On motion to set it aside,

*Per Cur.*—Considering the form of the writ of *ca. sa.*, which com-

* And where an attorney allows a defendant to be arrested, knowing that no debt was due, he is liable to an action for a malicious arrest. (H. T. 1837, N. P., *Stockley* v. *Homidge*, 8 C. & P. 11).

mands the sheriff to take the defendant and safely keep him, so that he may have his body in court to satisfy the plaintiff the debt and costs, coupled with the want of authority of the sheriff or his officers to receive the amount as depositaries for a plaintiff, we can have no doubt that a creditor, or his attorney, is bound to accept the money due to him when tendered, and to give an authority to the sheriff to discharge his debtor out of custody.

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BATES *v.* PILLING *and Another*, M. T. 1826. K. B. 6 *B. & C.* 38.

An attorney is bound to inform his agent of the payment of the debt, and if he does not, and execution is issued by his agent, trespass lies against him.

IN an action of treepass, it appeared that the defendant Pilling, who is a manufacturer at Manchester, had employed the other defendant, Seddon, an attorney, to recover a debt due to him from the plaintiff; that Seddon, after making several unsuccessful applications in the early part of March, instructed his agent at Chester to commence legal proceedings. On the 25th of March, the plaintiff was served with a distringas to attend the county court at Chester, and on the same day went to Manchester and paid to Seddon the debt and costs. Seddon had previously instructed his agent at Chester to issue a justicias, and on the 29th, the day on which this justicias was returnable, he wrote him word of the payment. Before the arrival of the letter containing this information at Chester, the agent had signed judgment, taken out execution, and put the writ into the hands of a sheriff's officer, who made a levy upon the goods mentioned in the declaration. The Court held, that trespass lay against the creditor and the attorney, as the act of misfeazance had been committed after the payment of the debt and costs, though if the execution had been issued before payment, it would not have been absolutely necessary for them to interfere and stop it.

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SOWELL *v.* CHAPMAN, T. T. 1838. Q. B. 6 *A. & E.* 412.

But where process is executed out of the jurisdiction of an inferior court, the attorney who delivers the precept to the officer is not liable.

AN attorney delivered a writ of execution to the bailiff of an inferior court, to be executed upon the goods of a certain party, whose house was supposed to be within the jurisdiction, but in point of fact was not. He knew the situation of the house, but gave no specific directions that the levy was to be made there, though he informed that party that the levy would be made. In action of trespass—

The Court held, that the attorney who places a writ for execution in the hands of an officer does a lawful act, though he may be fully persuaded that the officer will be likely to execute it in some particular place which may turn out upon inquiry to be out of his jurisdiction. The attorney's opinion upon such a point is immaterial; unless he induces the officer to act upon it, he is not bound to form any; the officer must at his peril act where he has the power. We think that the circumstances of the case go no further than to shew that when the attorney gave the precept he thought it would be executed at the plaintiff's house, without directing or authorizing it.

(*g*) FOR COSTS *.

(*h*) OF ATTACHMENTS †.

WILKINSON *v.* PENNINGTON, M. T. 1837. C. P. 3 *Scott*, 401; S. C. 6 *D. P. C.* 183.

To ground an attachment against an attorney there must be personal service of the rule,

ON motion for an attachment against an attorney for non-payment of costs. Every effort had since been made to serve this rule on the plaintiff, but without success.

The plaintiff was an attorney, and was therefore supposed to be in court; and on this ground it was suggested, that the proposed service should be substituted for personal service, which in cases of attachment was usually necessary.

*Sed Per Cur.*—We cannot make any fresh rule, that, because the plaintiff is an attorney personal service shall be dispensed with.

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WOOLLISON *v.* HODGSON, M. T. 1834. Ex. 3 *D. P. C.* 178.

or demand, unless an attachment be ordered to issue in a named time on a certain default.

ON application to make a rule absolute for an attachment, it appeared, that an attorney's bill having been ordered to be taxed after the client had given a bill of exchange for the amount, it was found he had been overpaid, and he was ordered to refund the over-payment to the client, and also by a subsequent order to pay the costs of taxation, more than a sixth having been taken off. Upon the application of the attorney to be allowed to pay these sums to the holder of the bill of exchange, (which had been dishonoured), instead of his client, he was ordered to do so in a week, or in default that an attachment should issue. Held, that no demand of these two sums was necessary to ground an attachment; but that it was his duty to seek the holder of the bill and pay the money to him.

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DOE d. HICKMAN *v.* HICKMAN, T.T. 1840. C. P. 8 *D. P. C.* 833.

A demand on an attorney to deliver up papers must be made by a per-

IN this action a rule of court had been made against the late attorney of the lessor of the plaintiff to deliver up all papers, deeds, &c. On motion for an attachment on the ground of a refusal by the attorney, the affidavit stating the demand was objected to, be-

* In cases of gross neglect the Court will order the attorney to pay the costs occasioned by his error or misconduct; however, where the plaintiff was nonsuited through the non-attendance of his attorney's clerk, the Court compelled the attorney to pay the defendant's costs of attending to try. (*White* v. *Sandell*, E. T. 1835, Ex., 3 D. P. C. 798).

† There must have been a rule for the delivery of the papers before a rule *nisi* for an attachment will be granted.—(*Coleridge*, J. *Roscoe* v. *Hardman*, T. T. 1836, B. C., 5 D. P. C. 157. So for not paying over money. (*Coleridge*, J. —*Twiss* v. *Fry*, T. T. 1836, B. C. 5 D. P. C. 157). And an attachment will not be granted for not delivering a full bill and correct account. (*Bayley*, B.—*Ex parte Laurence*, M. T. 1833, Ex., 2 D. P. C. 230). If a rule of Court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its non-payment. (*Coleridge*, J.—*Poole* v. *Watkins*, T. T. 1835, B. C., 4 D. P. C. 11). The Rule for an attachment for non-payment of a sum of money found due by an attorney to his client on a reference to the Master pursuant to a rule of Court, is *nisi* in the first instance. (*Patteson*, J.—*Ryan* v. *Furnell*, H. T., 1836, B. C., 4 D. P. C. 582). On an attachment for a contempt, the Court will take judicial notice that the attorney is on the roll, if it be not stated on the affidavit. (*Williams*, J.—*Ex parte Hore*, E. T., 1835, B. C. 3 D. P. C. 600. See post 476, *Downton* v. *Styles*).

son duly authorized, and that stated to the attorney, to ground an attachment for refusal.

cause it did not disclose any authority on the part of the defendant by whom the demand was made, nor that the defendant had stated that he was authorized so to act when he made the demand,

The Court held the affidavit to be insufficient.

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*In re* NEWBURY, M. T. 1835. K. B. 5 *N. & M.* 419; S. P. *Ex parte* GRANT, H. T. 1835. B. C. 3 *D. P. C.* 320.

An attorney had been guilty of fraud in not investing money pursuant to a rule of Court, the Court granted an attachment, notwithstanding his bankruptcy.

BY rule of Court, April 1834, an attorney was ordered to reinvest money of his client, obtained by fraud, by the 24th June; a fiat in bankruptcy, issued before that day, and certificate obtained, and no service of the rule and allocatur were made before the bankruptcy. On motion for an attachment,

*Per Cur.*—We are unwilling to exercise the jurisdiction which the Court have in issuing an attachment without seeing clearly that the case is such as may properly call for our interference, but we think independently of fraud in this case that the attachment ought to issue. The rule of April 1834, ordered the money to be reinvested before the 24th of June, otherwise that an attachment should issue so that there was an inchoate attachment before the bankruptcy. We think also under the circumstances that there is a distinct proof of fraud. It evidently was a fraudulent proceeding to deprive the client of her money, and we think we may well give effect to our own rule by granting this attachment.

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DOWNTON *v.* STYLES, M. T. 1837. C. P. 4 *Bing. N. S.* 122; S. C. 6 *D. P. C.* 189; S. C. 5 *Scott*, 414.

An affidavit in support of the attachment, need not in terms describe him to be an attorney.

7 WILL. 4, & 1 Vict. c. 56, s. 4, provides that any person who shall have been duly admitted an attorney in any one of her Majesty's Courts of Law at Westminster, shall be at liberty to practise in any other of her Majesty's Courts of Law at Westminster, although he may not have been admitted an attorney thereof; and that no person having been duly admitted an attorney or solicitor in any of her Majesty's Courts of Law or Equity at Westminster, shall be prevented from recovering or receiving the amount of any costs which would otherwise have been due to him by reason of his not being admitted an attorney or solicitor of the Court in which such costs shall have been incurred: provided always that any attorney or solicitor practising in any court of law or equity shall be subject to the jurisdiction of such Court as fully and completely, to all intents and purposes whatever, as if he had been duly admitted an attorney or solicitor of such Court.

On motion for an attachment against an attorney, the affidavit produced was objected to, because it did not expressly state the party to be an attorney of the particular Court.

But the Court overruled the objection, on the ground that it need not do so since the above statute.

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SHORT *v.* SMITH, E. T. 1840. C. P. 8 *D. P. C.* 584.

An affidavit stating that the rule for an attachment was

AN attachment having been obtained against an attorney as such; the affidavit of service of the copy of the rule stated that the service had been by leaving a copy "with the said attorney at his house,"

the affidavit was objected to because it did not allege "personal" service.

left "with him at his house," is sufficient.

*Sed per Cur.*—The affidavit is sufficient, there is no magic in the word "personal."

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RICHMOND *v.* BOWDITCH, H. T. 1836. 1 *M. & W.* 40; S. C. 7 *T. & G.* 241; S. C. 4 *D. P. C.* 749—S. P. KING *v.* PRICE, 1 *Price Rep.* 341.

Where money is to be paid under a rule at a named time, unless cause be shewn the rule for an attachment for non-payment is *nisi**.

ON motion against an attorney for an attachment for not paying over the money pursuant to the order of Court, it was submitted on the authority of *King* v. *Price*, that the rule should be absolute in the first instance. *Parke*, B. In *King* v. *Price* there was an order of this Court; but in this case it may be considered as the order of a Judge only; or at any rate, it was not made in the manner in which this Court usually makes such orders. In matters so penal as an attachment we will not extend the authority of *King* v. *Price* in any degree, but will act on the distinction alluded to, unless other cases can be cited. No other cases being cited, the Court granted a rule nisi.

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### (*i*) SUMMARY JURISDICTION OF THE COURT OVER.

#### 1. *At whose instance.*

THORNTON, *In re*, E. T. 1833. K. B. 2 *D. P. C.* 156.

An application to enforce the delivering up of deeds, can only be made by the party who deposited them.

SUMMARY application against an attorney to deliver up deeds. The applicant's right was founded on his having obtained a verdict in an action of ejectment, and had recovered possession of the estate, and that he had demanded the deeds of the attorney.

It was contended that as the application was not made either by the party who delivered the deeds to Mr. Thornton, or any party appearing to claim under him, the Court could not interfere; and of that opinion was *Taunton*, J.

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*Ex parte* CRISP, H. T. 1834. K. B. 2 *D. P. C.* 455.

Nor can a third party make a summary motion for the delivering up of a bill.

SUMMARY application by a legatee against an attorney for a will: it appeared, that shortly before the death of the testator, the will was given by the latter to him for the purpose of being destroyed; he accordingly took the will home with him, but before he had destroyed it, he heard of the testator's death; he then drew his pen across the will, and retained possession of it. Since that, the will had been demanded of him by the legatee, but not conceiving that she had a claim to it which he could recognise, he had refused to deliver it to her.

*Per Parke* J. The attorney was not bound to deliver it up or

* On an attachment, the Court will not make it absolute as to part and *nisi* as to part. (*Littledale*, J.—*Townley, ex parte*, M. T. 1834, B. C., 3 D. P. C. 39). But where an attorney disobeys a rule of Court requiring him to do a particular act, an application cannot, in the first instance, be made to strike him off the roll; but a rule nisi for an attachment may be obtained. If by the same rule he is required to pay certain costs, and a clause is also introduced into it, authorizing the issuing of an attachment in case of non-payment, that may at once issue, although a rule nisi only will be granted for disobedience to the other part of the rule. (*Patteson*, J.—*Ex parte Grant*, H. T. 1835, B. C., 3 D. P. C. 320).

to shew it, because there was no relation of attorney and client between him and her. The Court never interferes except where there is the relation of attorney and client.

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*In re* FENTON, T. T. 1835. K. B. 3 *A. & E.* 404; S. C. 5 *N. & M.* 239.

Or to pay money over.

IT appeared that an attorney had been allowed in account with the executor and residuary legatee, a certain sum as for legacy duty, but that legacy duty had never in fact been paid: on a summary application that the attorney should pay the sum so allowed in account to the Receiver-General,

Lord *Denman*, C. J.—This appears to me not to be a case in which this Court will interfere on an application not made on behalf of the client.

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2. *Over whom exercised*.*

NORTHFIELD *v.* ORTON, E. T. 1832. K. B. 1 *D. P. C.* 415.

Merely being an attorney is no ground for a summary application.

AN attorney being a party in the cause gave his undertaking to the sheriff in a case of adverse claims, the Court refused summarily to enforce it merely on the ground of his being an attorney.

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SCHWALBANKER, *Ex parte*, H. T. 1832. K. B. 1 *D. P. C.* 182—S. P. *Ex parte* CHITTY, M. T. 1833. K. B. 2 *D. P. C.* 421—S. P. *In re* MORRIS. 2 *Ad. & E.* 182.

And the misconduct complained of must be in his character of attorney.

A CLIENT had applied to his attorney to raise money on bills, which he declined doing, but offered to advance money on them as a security, which he did, but afterwards refused to account for the residue. The Court refused to compel him summarily, it not being in the course of his employment as attorney.

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DEANE, *Ex parte*, T. T. 1834. K. B. 2 *D. P. C.* 533.

And cannot be made for matter during his clerkship;

AN articled clerk during his clerkship had received money belonging to his late master. He was an attorney. On a summary motion to pay over such monies,

*Per Patteson*, J.—As he was not an attorney at the time when he became possessed of these sums, the Court cannot interfere summarily.

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JONES, *Ex parte*, T. T. 1833. K. B. 2 *Dowl.* 161.

or against an agent of an attorney.

THE plaintiff obtained a rule to shew cause why the agent of his attorney should not pay over to the plaintiff the costs of a *non pros.* alleged to have been caused by the neglect of the agents.

* On a summary application against an attorney to deliver up a bill, he cannot shew that he has then ceased to be an attorney of the Court. (*Patteson*, J.—*Simes* v. *Gibbs*, H. T. 1838, B. C., 4 D. P. C., 319). Money had been paid to one of several partners, attorneys, and applied to their joint purposes; the Court summarily ordered them to refund. (*Coleridge* J.—*Ex parte Ford*, T. T. 1840, B. C., 8 D. P. C. 685).

Misconduct in an attorney of the Court of Great Sessions will not be summarily interfered with unless an attorney of the superior court at the time. (*Littledale*, J.—*In re Williams*, M. T. 1836, B. C., 5 D. P. C. 236).

*Per Taunton*, J.—There was no privity between the plaintiff and his attorney's agents, and therefore the Court cannot interfere.

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STANHOPE *v.* FIRMIN, M. T. 1836. C. P. 3 *Bing. N. S.* 301; S. C. 4 *Scott*, 39.

Nor will the Court interfere where a party is made defendant without his consent, unless the attorney be insolvent.

IN replevin, after execution, a defendant, Evry, made an application to a Judge at chambers to have the money thus levied paid back upon an affidavit, wherein he stated, that he neither meddled with nor impounded the goods which had been distrained; that he did not know that he was made a defendant in the action; nor did he know that he was liable to costs until the levy was made upon him; and that he never authorized or empowered the attorney to appear for him and defend the action.

*Per Cur.*—We cannot come to a just conclusion upon the matter now submitted to our consideration without knowing the circumstances of the attorney. We agree with the law as we find it laid down in the case cited from 1 Salk. p. 88; where the Court refused to interfere, except where the attorney was an insolvent, against whom it would be of no use to bring an action.

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EVANS *v.* DUNCOMBE, H. T. 1831. Ex. 1 *Cr. & J.* 372; S. C. 1 *Tyrw.* 283.

But it seems the summary jurisdiction of the Court applies to an attorney not of the Court but practising through a clerk in court.

J. G., who acted as the defendant's attorney through the medium of a clerk in court, called upon the plaintiff's attorney and proposed to pay the debt and costs; which proposal being acceded to by the plaintiff the following undertaking was entered into:—"I, the undersigned, agree to pay the debt and costs in this action, 16th of July, 1830. J. G." Rule to shew cause why he should not pay the debt and costs in the action, and also the costs of this application.

*Per Cur.*—The case which has been cited is an authority for our enforcing this undertaking upon an application to our summary jurisdiction, although it could not be enforced by an action; and with respect to the other point, it is desirable that it should be fully considered; it being important that the Court should exercise a jurisdiction over attornies practising through agents in this Court, although they themselves are not admitted as attornies in it.

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### 3. *At what Time**.

* HARDING *v.* FRANCIS, T. T. 1831. C. P. 5 *M. & P.* 627.

On process sent by the sheriff to the defendant's attorney, who neglected to execute it,

ON a summary application against an attorney, it appeared, that the plaintiff having sued out a writ of *capias ad satisfaciendum* against the defendant, sent it to the sheriff to be executed. The under-sheriff sent the writ to the defendant's attorney who neglected to levy or act upon it.

* Unless the delay be explained the Court will not, after three terms, call on an attorney to answer a case of alleged oppression. (*Garry* v. *Wilks*, E. T. 1834, 2 D. P. C. 649). And a motion against an attorney to answer matters summarily cannot be heard on the last day of term. (*Williams*, J.—*In re Turner*, E. T. 1835, B. C., 3 D. P. C. 557).

the sheriff and not the attorney must be called on first.

But the Court held, that, as the under-sheriff had improperly parted with the process to the defendant's attorney, the plaintiff's remedy was against him in the first instance, before the latter could be made responsible for the payment of the debt on this summary application.

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4. *To what Court Application should be made.*

PATERSON, *In re*, T.T. 1832. K.B. 1 *D.P.C.* 468—S.P. GREAVES, *In re*, H.T. 1827. Ex. 1 *Cr. & J.* 374.

An undertaking by an attorney of K. B. in a cause in the Exchequer may be enforced in the former court.

AN attorney of K. B. gave an undertaking to pay the debt and costs of an action in the Exchequer, void by the Statute of Frauds, in not disclosing a sufficient consideration.

On motion to enforce it in K. B., *Ex parte Greaves*, 1 C. & J. 374, was cited, where an attorney of the Court of King's Bench, but not an attorney of the Court of Common Pleas, who was attorney for the defendant, agreed verbally to give his two promissory notes for the debt and costs, payable at six and nine months, in consideration of the plaintiff's staying proceedings.

*Per Cur.*—"Even supposing it to be void by the Statute of Frauds, this Court may nevertheless exercise a summary jurisdiction over one of its own officers, an attorney of the Court. That case is a direct authority.

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SHARP *v.* HAWKER, T. T. 1836. C. P. 3 *Bing. N. S.* 66; S. C. 3 *Scott*, 396; S. C. 5 *D. P. C.* 186.

But in general one Court will will not summarily interfere with an attorney as to business done in another*.

ON a summary application against an attorney it appeared that he was not an attorney of this court, but had acted in the name of one who was.

*Per Cur.*—Unless the motion is made in the Court in which the cause is pending the plaintiff is without remedy. It seems to us that the rule is answered by the fact of the alleged delinquent being *dehors* our jurisdiction.

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5. *When the Court will interfere and strike an Attorney off the Roll.*

*In re* GARBUTT, E.T. 1824. C. P. 2 *Bing.* 74; S.C. 9 *Moore*, 157.

An attorney merely carrying on business by a clerk at a distant place from his master.

MOTION to strike an attorney off the roll on an affidavit, which stated, that a person who had lately been his clerk, and who lived at a town eight miles distant from the residence of the attorney, and carried on business at an office, over the door of which was written the attorney's name, but that he only attended on market days, and then transacted all his business at an inn; the Court refused it on the ground, that it should have been shewn that such person either participated in the profits or carried on business on his own account.

* And no application can be made against an attorney at chambers unless there be a cause in Court. (*Littledale*, J.—*Ex parte* Higgs, M.T. 1832, B. C., 1 D. P. C. 495.

ANON., T. T. 1833. Ex. 2 *D. P. C.* 110.

Or a verdict passed against an attorney for libel, held no ground for striking him off the roll*.

A VERDICT having been obtained against an attorney in an action for publishing a libel of a very aggravated nature, but in which the jury only gave 1*s.* damages, motion was made to strike him off the roll on that ground.

*Per Cur.*—If you had any case where a verdict under such circumstances has been made the foundation of such an application, we would grant you a rule; but here there was conflicting evidence at the trial, and it is doubtful whether the publication was brought home to the defendant.—*Rule refused.*

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PAGET *v.* CHAMBERS, T. T. 1839. C. P. 5 *Bing. N. S.* 630; S. C. 7 *Scott*, 610—S. P. *In re* ——, T. T. 1831. K. B. 2 *B. & Ad.* 766.

So, where an attorney was re-admitted in K. B. in 1823, but did not take out his certificate until 1836, the Court refused to strike him off the roll, 1839.

ON motion to strike an attorney off the roll, it appeared that he had been admitted in the Court of Common Pleas, in January, 1826, without fraud, upon an affidavit that he was then an attorney of the Court of King's Bench; and upon producing his admission in that court in 1810, and reading his affidavit, that he had paid the duty on the articles, and that he had been admitted an attorney of the Court of King's Bench, but had ceased to practise in 1820; had been re-admitted in the Court of King's Bench in 1823, but had not taken out his certificate after such re-admission till January, 1836.

*Per Cur.*—The question is, whether this Court is bound to strike the attorney's name off the roll, on the ground, not that his admission is absolutely void, but, that as the facts now appear, it may have been irregularly obtained; and we think under the circumstances, and particularly observing the great distance of time at which the objection is made, that we are not called upon in the exercise of a sound discretion to direct his name to be struck off.

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*In re* PALMER, H. T. 1835. K. B. 4 *N. & M.* 529—S. P. *In re* HODGSON, H. T. 1835. B. C. 3 *D. P. C.* 330.

But where an attorney has allowed an unqualified person to practise in his name, they will strike the former off the roll†.

ON motion to strike an attorney off the roll, it was referred to the Master, who reported, that, in the year 1829, Palmer was residing at C., and also occupying occasionally part of a house at B., in which E. lived, and of which E. paid the rent and taxes, he at the time being articled to Palmer, the name of E. being on the door, as well as that of Palmer. The Master added, that E. had practised in Palmer's name in two instances: the one in 1832, several writs were placed by E. in the hands of an officer to be executed, having Palmer's name upon them. In the second instance, that, in 1829 and 1830, an action, *Davis* v. *Ashford*, was carried on

* Nor is it any ground for striking an attorney off the roll that he has brought several *qui tam* actions, and then endeavoured to compromise them. (*Patteson*, J.—*Smith* v. *Gillett*, H. T. 1835, B. C., 3 D. P. C. 364). Or, having been convicted of a conspiracy. (*Park*, J.—*Anon.*, H. T. 1832, B. C., 1 D. P. C. 174). Or because he is in contempt for not obeying an order of court, the remedy being by attachment. (*Littledale*, J.—*Townley, Ex parte*, M. T. 1834, B. C., 3 D. P. C. 39; S. P. *Patteson*, J.—*Grant, Ex parte*, H. T. 1835, B. C., 3 D. P. C. 320).

† So, signing a fictitious name of a counsel to a demurrer is a ground for striking him off the roll. (*Smith* v. *Matham*, 4 D. & R. 738).

in the name of Palmer, with the knowledge and concurrence of Palmer, in the course of which E. appeared and acted as the attorney, and, after verdict obtained, claimed to have the costs paid to himself, and objected to their being paid to Palmer.

*Per Cur.*—Where the Master reports beyond all doubt that one attorney has permitted another not duly qualified to practise in his name, we are bound, under the 22 Geo. 2, c. 46, to strike the former off the roll.

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*In re* ——, H. T. 1834. K. B. 3 *N. & M.* 566—S. P. Pitt, *Ex parte*, M. T. 1833. K. B. 2 *D. P. C.* 439.

An application to strike an attorney off the roll must be made by counsel*.

In this case the plaintiff in person applied to strike an attorney off the roll.

*Sed per Cur.*—The Court has said, that they will not receive an application of this sort, except at the hands of a barrister.

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*In re* King, T. T. 1834. K. B. 1 *Ad. & E.* 560; S. C. 3 *N. & M.* 716.

An affidavit to strike an attorney off the roll for misconduct must state that the deponent believes the grounds stated to be true†.

The affidavits in support of a motion to strike an attorney off the roll were objected to; because it was not stated in any of the affidavits, that, according to the information and belief of the deponents, Mr. King had been guilty of any offence charged by the affidavits.

*Sed per Cur.*—It is not sufficient for the deponents to state facts from which such misconduct may be inferred, without directly asserting their belief that the party charged has been actually guilty of such misconduct.

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Dicas *v.* Warne, E. T. 1834. C. P. 4 *M. & Scott*, 470; S. C. 2 *D. P. C.* 812.

Where a motion to strike an attorney off the roll is referred to the Master, he is not confined to the original affidavits.

Whether an attorney should be struck off the roll was referred to the prothonotary after he made his report. A rule was obtained, that the matter might be referred back to the prothonotary, with directions, that he should take into his consideration certain additional affidavits that had been tendered to him on the hearing, and rejected by him on the ground that they were not before the Court when the matter was referred to him.

*Per Cur.*—In a case of this description the officer may receive anything that tends to elucidate and further the inquiry; he may even examine the parties personally.

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6. *When to enforce Undertakings, or punish for Breach of them*‡.

*Ex parte* Watts, M. T. 1832, B. C. 1 *D. P. C.* 512—S. P. *Ex parte* Bateman, T. T., 1833, K. B. 2 *D. P. C.* 161.

An undertaking by an attorney

On motion for an attachment against an attorney for not fulfilling his undertaking, it appeared that a person had become indebted for

* And cannot be made within the last four days of term, nor can cause be shewn on the last day of term. (Lord *Lyndhurst.—Anon.* M. T. 1833, Ex., 2 D. P. C. 227).

† So, where an attorney applies to strike himself off the roll, the affidavit must state that no proceedings are pending, and that he expects none. (*Ex parte Gray*, H. T. 1841, B. C., 9 D. P. C. 336).

‡ Where the premium for an articled clerk was paid by a note not to be negotiated for five years, and the attorney did negotiate it, and an action was

various sums of money to the applicant, for which the attorney had given his undertaking, though he did not act as the attorney for debtor.

not in a cause, cannot be enforced summarily.

*Per Littledale,* J.—The Court has never interfered to attach an attorney for the non-fulfilment of his undertaking, unless he is engaged as attorney in the cause in which the undertaking is given.

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*Ex parte* BODENHAM, M. T. 1838. Q. B. 8 *A. & E.* 959.

A COMMISSION of lunacy had been held, in the conducting of which Mr. Parker had acted as the attorney for the petitioners. Heavy expenses had been incurred; and, at the close of the inquiry, a large sum was due for fees to the commissioners, the jury, and Mr. B., the under-sheriff. Mr. Parker, on application for payment, gave to Mr. B. an undertaking to pay him the usual fees due to him, the commissioners, and the jury. On shewing cause against a rule, calling on M. Parker to pay the money, it was objected that the proceedings arose in another Court, and that no privity was shewn between Mr. Parker and Mr. B.; but the Court made the rule absolute upon the authority of *In re Aitkin,* 4 B. & Ald. 47. *In re Knight,* 1 Bing. 91. And see *In re Marris,* 2 A. & E. 582; 1 C. & J. 372, 374, n.

But an undertaking will be enforced, where it is given and accepted from an attorney in his professional character, although given in reference to proceedings out of Court.

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HEELINGS *v.* JONES, E. T. 1825, C. P. 3 *Bing.* 70; S. C. 10 *Moore,* 360.

IN this case, it appeared that after writ was sued out, the defendant's attorney applied to stay the proceedings, which was done on his entering into an undertaking to pay the plaintiff his debt and costs; but that previously to the commencement of the taxation, or before the time for putting in bail had arrived, the defendant died insolvent, and it was, therefore, contended that his death had discharged his attorney from his undertaking.

Client's death before bail put in, does not exonerate an attorney from his undertaking to pay costs on staying proceedings*.

*Sed per Cur.*—We are of opinion that the attorney was bound to perform his engagement notwithstanding the death of the defendant,

brought on the note; the Court compelled the attorney to take it up. (*Taunton,* J.—*Ex parte Gardner,* E. T., 1834, B. C., 2 D. P. C. 520. But an attorney's undertaking to indemnify another attorney whose name he has used, must be enforced by action, and not summarily. (*Littledale,* J.—*Ex parte Clifton,* M. T., 1836, B. C., 5 D. P. C. 218). So, where an attorney gives an undertaking not professedly as an attorney in a cause, it cannot be enforced summarily, the remedy being by action. (*Walker* v. *Arlett,* T. T., 1831, K. B., 1 D. P. C. 61). Where a plaintiff is improperly delayed in his action in consequence of the defendant's attorney not fulfilling his undertaking to enter an appearence in due time, the Court will not compel the latter to give security for the debt and costs, conditional on the plaintiff's obtaining a verdict. (*Williams,* J.—*Morris* v. *James,* E. T. 1838, B. C., 6 D. P. C. 514).

* Where, on the compromise of a road prosecution, the attorney entered into an undertaking on the part of defendant to pay the costs, it being agreed that C. should tax them, which had been done:—Held, that it was a personal engagement, and it was too late to say that he had no notice of the taxation after action brought, he not having objected to such taxation when first apprised of it. (*Watson* v. *Murrel,* 1 Carr. (N. P.) 307). An undertaking by defendant's attorney, that he will procure for the plaintiff a cognovit, is waived by the plaintiff stating he intends to proceed with the action. (*Miller* v. *James,* 8 Moore, 208). The Court will interfere summarily to compel an appearance pursuant to an undertaking to that effect. (*Mould* v. *Roberts,* 4 D. & R. 719).

as he had, by his undertaking to pay the costs, admitted the justice of the plaintiff's claim.—And they assimilated it to a case of judgment by default; and as the admission of the attorney was equivalent to such judgment, as well as to the amount of the debt, they ordered the rule to be made absolute, but without costs.

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KITE *v.* MILMAN, M. T. 1832. C. P. 2 *M. & Scott*, 616.

An attorney forced to pay on his undertaking, cannot have the benefit of the execution against his debtor.

THE defendant's attornies were, upon a personal undertaking, ordered to pay the damages and costs. The Court held that they could not give them the benefit of the execution against the defendant; but, on their payment according to the order, the defendant would be entitled to be discharged.

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### 7. *When the Court will order him to pay over Money, or refund Costs.*

SIBLEY *v.* LEICESTER, M. T. 1833. Ex. 2 *D. P. C.* 234.

Money in the hands of the attorney belonging to his client cannot be retained, on the ground that a rule is pending to shew cause why the attorney should not refund part.

THE defendant, an attorney, received a sum of money under an execution due to the plaintiff. An objection being taken to the amount levied, the defendant refused to pay it over to his client, on the ground, that a rule was pending to shew cause why part of the money paid by the defendant, (Tippett), should not be refunded. That rule was enlarged to Trinity Term, and ultimately referred to the Master, but no appointment had been made upon the reference.

*Per Bayley*, B.—The attorney has no right as against his client to, retain money in his hands which he has received as attorney for his client, even though a rule was then pending before the Master, calling on the plaintiff or his attorney to refund part of the money.

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HODGSON *v.* TERRALL, M. T. 1833. Ex. 2 *D. P. C.* 264.

But where there is a special agreement between attorney and client, money will not be ordered to be paid over summarily*.

ON a summary application by the plaintiff against his attorney, calling on him to shew cause why he should not pay over to him the sums of 15*l.* and 12*l.*, it appeared the plaintiff had employed the attorney to recover them for him on the terms, as he swore, of paying only taxed costs, and that the amount of the verdict was at all events to be paid over to him.

*Bayley*, B.—You must go before a jury, who will be competent to decide whether there was such an agreement. We cannot interfere summarily.

* NOR will the Court grant a rule against an attorney who has advised his client, an insolvent, to pay money which the Insolvent Court has deemed a misapplication, and remanded the insolvent for it. (*Smith* v. *Tower*, T. T. 1834, Ex., 2 D. P. C. 673). So, if an attorney, employed to retain a proctor to procure probate of a will, receives money to pay the proctor and misapplies it, the Court will not summarily interfere. (*Williams*, J.—*Ex parte Cowie*, E. T. 1835, B. C., 3 D. P. C. 600).

CULLIFORD *v.* WARREN, E. T. 1828. K. B. 8 *B. & C.* 220—S. P. *In re* BONNER, E. T. 1833. K. B. 1 *Nev. & M.* 555; S. C. 4 *B. & Ad.* 811.

Nor will the Court order a bankrupt attorney to refund money received for a particular purpose in the absence of fraud*.

ON a summary application calling on an attorney to pay over a certain sum of money, it appeared that, after the receipt of the money by the attorney for the purpose alleged, there had been a treaty for transferring the mortgage, and that he had promised to settle the interest with the first mortgagee at the time of the transfer, but had subsequently been made a bankrupt and duly obtained his certificate.

*Sed per Cur.*—If an action were brought against Warren for money had and received, the certificate might be pleaded in bar in the absence of any particular fraud, shewn in his character of attorney; there was no ground for the interference of the Court.

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WRIGHT *v.* SOUTHWOOD, T. T. 1827. Ex. 1 *Y & J.* 527.

A solicitor who has been overpaid without fraud, will not be called upon to refund with interest.

A SOLICITOR engaged in various suits obtained payment out of court of a sum of money standing in trust in the cause, and retained it towards his costs; and upon a subsequent taxation of his bill it appeared, that at the time he obtained payment of the money, he had in fact been already overpaid. The Court refused, upon a motion for that purpose, to charge him with interest; the parties having made considerable delay before they taxed the costs, and there being laches imputable to the solicitor.

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MEGGS *v.* BINNS, E. T. 1836. C. P. 2 *Bing. N. S.* 625; S. C. 3 *Scott*, 52; S. C. 5 *D. P. C.* 28.

And to induce the Court to compel an attorney to refund costs unnecessarily incurred, gross negligence must be shewn.

ON motion calling on an attorney to refund a sum of money paid by the client for costs, in consequence of the attorney's alleged negligence—

*Per Cur.*—To enable plaintiff to succeed in his motion, it is necessary for us to see whether the attorney was guilty of such gross negligence as would compel us to interfere in this summary way. If there is any circumstance of doubt in the case, the attorney is entitled to the benefit of it, as any other person is whose case may be the subject-matter of discussion before a jury.

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8. *When the Court will order him to deliver an Account.*

*Ex parte* LAURENCE, M. T. 1833. Ex. 2 *D. P. C.* 230.

An affidavit, impeaching an

A JUDGE'S order had been obtained that certain attornies should deliver to their client an account of all monies received on his be-

* So, where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt, and obtained his certificate, the Court will not on motion order him to pay the money so received; the amount being a debt barred by the certificate. But, if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment as a modification of the punishment which it might otherwise inflict for his misconduct. The case of fraud, however, ought to be clear; and the attorney should have notice by the form of the rule that the application is of a penal nature. It is not enough to call upon him to shew cause why he should not pay over the money. (MS.) Nor will the Court interfere summarily by ordering him to pay over a debt "*with interest.*" (*Littledale*, J.—*Fenn* v. *Held*, M. T. 1832, B. C., 1 D. P. C. 498. Vide *Wright* v. *Southwood*, supra).

account delivered by an attorney, pursuant to a Judge's order, does not render him liable to the summary jurisdiction of the Court*.

half, in respect of a certain action and otherwise. On motion for an attachment against the attornies for not obeying the rule of Court, and also for the costs of making the Judge's order a rule of court, the affidavit stated that they had received a sum of 13*l.* 8*s.* for costs on one occasion, for which they had not given credit; and also, that they had some goods at a certain price, which were taken to be as money.

*Per Bayley*, B.—Can you mention any instance where an attachment has been obtained for not delivering an account where the account has been in part given, but some items are not included? An attachment can only be on the ground of wilful contempt.

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*In re* Bunting and Others, H. T. 1835. K. B. 2 *Ad. & E.* 467.

On a summary motion to compel an attorney to account, all the parties must concur.

A. died, leaving his widow surviving. Two of the executors proved the will. The last surviving trustee under the settlement died, leaving a son, to whom, as his heir at law, the legal estate in the settled property descended, but who never was appointed a trustee. Before and after the testator's death an attorney was employed in business relating to the settled and devised estates, for which a sum of money was due to him; and he held the title-deeds. After the testator's death, the son of the trustee under the settlement and one of the executors joined in an application to the Court that the attorney might account for all sums received by him in respect of the estates, and deliver up the deeds to the trustees for the said estates, on payment to him of anything that might appear to be due from them. The other executor and all the other parties beneficially interested objected to the application.

The Court refused to interpose, the rights of the parties not being clear, and one executor not concurring in the motion.

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*In re* Lord, T. T. 1835. C. P. 2 *Scott*, 131.

And, on motion to refer accounts, the affidavit must shew that the party is an attorney of the Court, and that they relate to a cause before the Court.

On motion to refer to the prothonotary certain accounts delivered to the applicant by his late attornies upon a suggestion of fraud, it was contended, that, as the affidavits upon which the rule had been obtained did not make it appear either that the parties against whom the application were made were attornies of this Court, or that the accounts in question, or any part of them, arose out of any cause in this court, the Court would exercise no jurisdiction in the matter.

And of that opinion were the Court.

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*In re* Lord Cardross, M. T. 1839. Ex. 5 *M. & Cr.* 545; S. C. 8 *D. P. C.* 861.

And where an attorney has ef-

H. and B., attornies of the Court, had effected a policy on the life of Lord C., who was indebted to them in a balance at the time

* An attorney who is retained to raise money by way of mortgage, will be ordered, summarily, to account for the money so received. (*Coleridge*, J.—*Ex parte Cripwell*, T. T. 1837, B. C., 5 D. P. C. 689). So, where money had been received in a cause, even after nine years. (*Coleridge*, J.—*Ex parte Sharpe*, T. T. 1837, B. C., 5 D. P. C. 717). And such a rule may be served on his agent. (*Littledale*, J.—*Burrell* v. *Seaton*, T. T. 1837, B. C., 5 D. P. C. 601).

of his death. The administrator had obtained a rule for delivery of their bill, and an account of the proceeds of the policy, and that the latter, after payment of the balance, should be delivered up. After argument—

The Court discharged the rule, on the ground that they had no jurisdiction to call upon the attornies to give an account, merely because the client had given a security for the payment of the debt.

*See In re Aitkin*, 4 *B. & Ad.* 47; *and Ex parte Schwalbanker*, 1 *D. P. C.* 182.

fected a policy on the life of his client, to secure a balance due to him, the Court will not summarily compel him to account with the administrator.

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9. *When to answer Matters by Affidavit*.*

ANON., M. T. 1833. Ex. 2 *D. P. C.* 227.

A RULE, calling on an attorney to answer the matters of an affidavit, was moved four days before the end of the term.

*Per Cur.*—It is too late now to have a rule calling on the attorney to answer the matters of the affidavit. Cause cannot be shewn on the last day of term.

An attorney cannot be called on, by rule, to answer matters by affidavit moved four days before the end of the term;

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*Ex parte Pitt*, M. T. 1833. K. B. 2 *D. P. C.* 439.

THE applicant applied, in person, for a rule calling on certain attornies, whose names he mentioned, to answer certain matters contained in an affidavit made by the applicant.

*Per Denman*, C. J.—The motion against an attorney being in the nature of a criminal information, the Court requires that it should be made by a gentleman at the bar; and it cannot be made in person.

and such application must be made by counsel.

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*In re* ———, H. T. 1834, K. B. 5 *B. & Ad.* 1088.

ON a summary application against an attorney—

Lord *Denman*, C. J., said,—On an application calling upon an attorney to answer the matters of an affidavit, it is not usual to grant the rule if an indictable offence is charged.

*Patteson*, J., referred to *Short* v. *Pratt*, 1 *Bing.* 102.

An attorney will not be compelled to answer by affidavit, summarily, matters amounting to an indictable offence.

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10. *For Perjury.*

*In re* ———, T. T. 1838. Q. B. 3 *N. & P.* 389.

On a summary application against an attorney, there was enough in the affidavit to shew a distinct case of perjury; but that there was no admission.

*Sed per Cur.*—We are not in the habit of interposing in such a case, unless there is something amounting to an admission on the part of the attorney, which would render the interposition of a jury unnecessary.

The Court will not summarily interfere on the ground of perjury in an affidavit, unless there be some admission by him.

* The Court will not compel an attorney to answer matters by affidavit, merely because he has hired insufficient bail to justify in an action. (*Littledale*, J.—*Clifford* v. *Parker*, M. T. 1836, B. C., 5 D. P. C. 226).

### 11. *When to deliver up Deeds.*

*In re* HOLDSWORTH, E. T. 1838. C. P. 4 *Bing. N. S.* 386; S. C. 6 *Scott*, 170.

An attorney, one of several trustees, will be ordered to deliver a draft to the cestui que trust if he has paid for it*.

CALLOW and another were the trustees to the marriage-settlement of Holdsworth, by which certain property was secured to the separate use of his wife. Holdsworth having paid all charges, applied for the draft of the settlement, which he claimed as his own. The application was refused by Callow, in whose possession the draft was, on the ground that the document belonged to the trustees, and consequently there was no foundation for the husband's claim.

*Per Cur.*—The only question is, if the cestui que trust be not entitled to know the contents of the deed. If the party required the copy, and, if the delivery were refused, a court of equity would no doubt compel the production. It would certainly be strange if he who was liable to certain trusts should not be allowed a knowledge of that to which he was liable. Here the husband says, "I have paid for the draft, it is mine; I ask for and must have it:" and the answer is, "It is held in trust as the deed itself." The single question here is, if we can say that the draft is held by the party refusing to deliver it as trustee; and, in our opinion, we cannot say it is.

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*In re* OLIVER, H. T. 1835. K. B. 2 *A. & E.* 620; S. C. 4 *N. & M.* 471.

And, where an aged female signed a memorandum, allowing judgment by default, in ejectment to be set aside, the Court ordered it to be cancelled.

AN attorney had obtained from an aged lady, in the absence of her attorney, her signature to a paper, whereby she agreed to abandon a judgment in ejectment, obtained by her by default of the tenant in possession, and to allow the question of title to be fairly tried, as between her and the attorney's client, landlord of the tenant in possession. On an application that the attorney be ordered to deliver it up—

*Per Cur.*—Here is an attorney going with a paper in his handwriting, to which, in some way or other, he obtains the signature of this old lady, by which she, having recovered in an action of ejectment, and obtained a writ of possession, acknowledges that she has no right to the land; although she says, that in a short time she shall have an opportunity of consulting her attorney. The practice

* So, where a testator had deposited his will with his attorney, the Court refused to interfere summarily, even at the instance of the sole legatee. (*Park*, J.—*Ex parte Crisp*, H. T. 1834, B. C., 2 D. P. C. 455). So, an attorney who has deeds to raise money on, will not be compelled to deliver them if he claims a lien for his services. (*Taunton*, J.—*In re Millard*, M. T. 1831, B. C., 1 D. P. C. 140). But, a defence to the attorney's bill that he was not the attorney, does not preclude the party from applying, that the attorney be ordered to deliver up papers, &c. (*Coleridge*, J.—*Ex parte Maxwell*, T. T. 1835, B. C., 4 D. P. C. 87). Where a client has deposited deeds in the hands of his attorney, and the latter afterwards becomes bankrupt, the Court will not summarily interfere to compel the assignees to deliver up those deeds which have come to their hands from the bankrupt. (*Per Coleridge*, J.—*Ex parte Roy*, H. T. 1835, B. C., 4 D. P. C. 573). Nor will an attorney who prepares his own marriage-settlement, and in whose hands it is placed for safety, after many years be ordered to give it up to a trustee summarily. (*Littledale*, J.—*Ex parte Moxon*, M. T. 1830, B. C., 1 D. P. C. 6).

of the officers of this Court would be very impure, and often fraudulent, if we permitted things of this sort to be done.

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*In re* WALMESLEY, H. T. 1835. K. B. 4 *N. & M.* 543; S. C. 2 *A. & E.* 675.

A TRUSTEE delivered to his attorney, acting in that character, papers relating to the trust affairs. The attorney himself had some beneficial interest in the trust property. A bill, in equity, was filed against the trustee, and against the attorney and other parties interested, for a discovery of the property; whereupon the trustee demanded the papers of the attorney, for the purpose of preparing his account. The plaintiffs gave the attorney notice to retain them, which he did. The trustee obtained a rule nisi in this Court for a delivery of the papers to him. Pending the rule an order was made in the Chancery suit, at the instance of the plaintiffs, that the attorney, within seven days after service of the order, should deposit the papers with his clerk in Court. On cause being shewn soon afterwards against the rule, in this Court, it did not appear whether or not the attorney had yet complied with the order in Chancery, the time for filing affidavits in answer to this rule having expired before the time for depositing the papers; but, inasmuch as the attorney was compellable by attachment to deposit them, this Court discharged the rule.

An attorney who is only equitably interested in deeds, cannot detain them; but if he has given them to an officer of a court of equity by order of that Court, that is sufficient.

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### 12. *To procure Counsel's Signature.*

MOSTYN *v.* CHAMPNEYS, M. T. 1834. C. P. 1 *Scott*, 57; S. C. *by name of* ROY *v.* CHAMPNEYS, 3 *D. P. C.* 105.

THE Court of Chancery directed a case for the opinion of this Court to be settled and signed by counsel. In the event of the counsel for the respective parties not agreeing upon the facts to be inserted therein, the case should be settled by a Master in Chancery. The counsel did disagree, and the case was accordingly settled by a Master, and certified by him. One of the parties being dissatisfied with the statement of facts therein, refused to obtain the signature of counsel to the case. On motion to compel him to do so—

*Per Cur.*—We do not think we have any power to grant a rule against the attorney. The disobedience of the order of the Vice-Chancellor is no contempt of this Court. We have no cause before us; and, until it is regularly presented to us, we can know nothing of the matter. The contempt, if any, is of another Court.

A summary application to the Court to compel an attorney to procure counsel's signature, where requisite, will not be granted.

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### 13. *For making a fictitious Case.*

*In re* ELSAM, M. T. 1824. K. B. 3 *B. & C.* 597; S. C. 5 *D. & R.* 389.

ON a special case. During the argument it seemed to one of the learned Judges that the case had been fabricated for the purpose of taking the opinion of the Court upon a point of law. It appeared, on a reference to the Master, that Mr. Elsam had made a fictitious case to obtain the opinion of the Court on the words of the will; because he had applied a large part of the personal estate in pay-

In the absence of fraud, an attorney, making a fictitious case, for the opinion of the Court, is only finable.

ment of pecuniary legacies, and it became necessary to raise money on security of the estate.

*Per Cur.*—If our opinion had been obtained, the judgment would have operated on parties not aware of these proceedings. We do not think that the person before the Court intended to commit a fraud, and we shall therefore punish him for this contempt with as much leniency as is consistent with the pure administration of justice. We do order and direct that he pay a fine of 40*l.* to the king, and be imprisoned until that fine is paid.

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14. *To be censured by the Court*.*

15. *Of the Attorney's Presence when the Rule is heard†.*

## X. RIGHTS OF, IN RELATION TO HIS COSTS.

### (*a*) Respecting the bill of.

#### 1. *In what Manner to be prepared‡.*

Smith *v.* Brown, T. T. 1831. Ex. 1 *C. & J.* 542; S. C. 1 *Tyrw.* 486; S. C. 5 *C. & P.* 94.

Bill of costs by partners may be signed in the name of the "firm."

A bill of costs, proved to have been delivered, appeared to have been signed by Smith, for himself and Jago, who had been his partner at the time of the business done. It was contended, that the Christian names, as well as the sirnames of each of the partners ought to have appeared in the signature.

*Per Cur.*—The 22nd section of the stat. 2 Geo. 2, c. 23, is quite as distinct in requiring the name of the attorney to be indorsed on the process; and yet, in practice, it is always found that when process is issued by attornies acting in partnership, it is indorsed with the name of the firm, and that is considered as an indorsement of the name, within the meaning of that section of the act of Parliament. Therefore, as it seems to us Smith and Jago were the proper names with which these plaintiffs ought to have signed the bill, and each partner having a right to subscribe the name of the partnership firm for partnership purposes, the signature of the firm of Smith & Jago is a signature of the proper name, within the meaning of the statute.

* An attorney, by preparing a bail-bond for a larger sum than requisite, subjects himself to the censure of the Court. (*Tindal*, C. J.—*Wingrave* v. *Godmond*, E. T, 1833, N. P., 6 C. & P. 66).

† On a rule for answering matters summarily, the attorney must be in Court when made absolute. (*Coleridge*, J.—*Ex parte Whicher*, T. T. 1837, B. C., 5 D. P. C. 715).

‡ Abbreviations in a bill of costs, where the meaning is obvious, do not vitiate. (Lord *Tenterden*, C. J.—*Frowd* v. *Stillard*, T. T. 1829, N. P., 4 C. & P. 51).

If several matters form but one transaction, part at law and part conveyancing, both should be included in the same bill. (*Coleridge*, J.—*Doe* d. *Palmer* v. *Roe*, T. T. 1835, B. C., 4 D. P. C. 95). But that objection cannot be taken at the trial of an action brought for the fees, &c. (*Tindal*, C. J.—*Becke* v. *Penn*, T. T. 1835, N. P., 7 C. & P. 397).

NANNY *v.* KENRICK, H. T. 1834. Ex. 2 *D. P. C.* 334.

Where several defendants apparently defend by several attornies, though, in fact, the business is done by one, they must make a joint charge*.

IN an action for a malicious arrest against several defendants, they defended separately; and ultimately, having got judgment, as in case of a nonsuit, they made out separate bills of costs, and the Master allowed costs as regarded each.

*Per Bayley*, B.—Where several defendants defend separately, and apparently by different attornies, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge.

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WALLER *v.* LACY, E. T. 1840. C. P. 8 *D. P. C.* 563.

A bill for extra costs must state those he has received from the adverse party.

A BILL of costs contained a charge for extra costs, and did not include those items which the attorney had previously received from the adverse party.

*Per Cur.*—The charge in the name of extra costs, though of specific items, does not answer the terms of the statute. The bill must give the history of the cause, and give credit for what has been paid by the adverse party.

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2. *In what Time and in what Cases to be delivered.*

BLUNT *v.* HESLOP, T. T. 1838. Q. B. 8 *Ad. & E.* 577; S. C. 3 *N. & P.* 553.

The words, one month, in the 2 Geo. 2, c. 23, before action brought on an attorney's bill, mean twenty-eight days, both exclusive of the day of delivery and of commencing the action.

ASSUMPSIT on an attorney's bill. Plea—That the action was commenced less than one month after the delivery of a signed bill of costs, which was denied in the replication. It appeared that the bill was delivered on the 12th January 1836, and the writ was sued out on the 9th February; so that the month was not complete unless one of those days could be taken into the account. The Judge reserved the point, giving the defendant leave to move to enter a nonsuit. On a rule accordingly, it was contended, that, on a right construction of the statute, a lunar month ought to elapse between the days of delivering the bill and commencing an action, exclusive of both days.

And of that opinion were the Court.

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SMITH *v.* WATTLEWORTH, T. T. 1825. K. B. 4 *B. & C.* 364; S. C. 6 *D. & R.* 510; S. C. 1 *C. & P.* 615.

Bill for business done in the Insolvent Court,

ACTION on an attorney's bill for business done in the Insolvent Court. It appeared that the plaintiff had not delivered his bill a month before the action commenced. It was objected, that the plaintiff could not recover; and statute 2 Geo. 2, c. 23, s. 23, was cited. It was proved that there is a tax-master appointed by the Insolvent Court; whereupon the plaintiff was nonsuited. On motion to set it aside—

*Per Cur.*—The plaintiff, an attorney of this Court, has done business for another, which we consider business at law and within the statute. It is not clear that the tax-master of the Insolvent

* Although part of an attorney's bill be not made out as required by 2 Geo. 2, he may recover for that part which is. (*Abbott*, C. J.—*Drew* v. *Clifford*, T. T. 1825, N. P., 2 C. & P. 69; S. C. 1 R. & M. 280).

Court has power to tax between attorney and client; for his power might be to tax costs awarded by that Court; but, admitting that he had the first-mentioned power, that would not take the case out of the stat. 2 Geo. 2, which is highly beneficial to the subject. A bill for business done at Quarter Sessions has been held taxable in this Court. Where there is an officer in an inferior court whose business it is to tax bills for business done there, then, after delivery of a bill, according to 2 Geo. 2, he may be applied to, to tax it. If there is no such officer, it may be referred to the Master of this Court, to tax it as for business done here. The bill ought to have been delivered.

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SYLVESTER *v.* WEBSTER, M. T. 1832. C. P. 1 *D. P. C.* 708; S. C. 9 *Bing.* 388; S. C. 2 *M. & Scott*, 506.

or at the Quarter Sessions,

THE question in this case was, whether an attorney's bill for business done at Quarter Sessions must be delivered, pursuant to 2 Geo. 2, c. 23, a month before action brought.

*Per Cur.*—The 22 Geo. 3, c. 46, s. 12, "No person whatsoever shall act as attorney at any General or Quarter Sessions of the Peace for any county, &c. within the kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted an attorney of one of His Majesty's Courts of Record at Westminster, and duly inrolled, pursuant to the act 2 Geo, 2. If we construe these statutes as made in pari materiâ, there appears no reason why an action brought by the same person, to recover fees for business done in the Court of Quarter Sessions, should not be subject to the same law as an action "for fees, charges, and disbursements at law or in equity" is subjected to by the 2 Geo. 2.

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WARDLE *v.* NICHOLSON, H. T. 1833. K. B. 1 *N. & M.* 355; S. C. 4 *B. & Ad.* 469.

or County Court, must be delivered one month before action.

IN an action on an attorney's bill for business done in the County Court, the plaintiff had not delivered any signed bill to the defendant before action brought. After action brought, he delivered a bill of particulars.

*Per Cur.*—22 Geo. 2, c. 23, s. 23, enacts, that no attorney of any of the Courts aforesaid shall commence any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after the delivery of a bill, &c. That section is not confined to business done in the Courts mentioned in the first section; but extends to all fees, charges, &c., either at law or in equity. It has been held to apply to proceedings at Quarter Sessions. One question here is, whether fees for business done in the County Court are to be considered fees, charges, &c., at law, recoverable by an attorney of any of the Courts aforesaid within the statute. Our brother, Patteson, has referred to the 12 Geo. 2, c. 13, s. 7, which subjects to a penalty any person who shall commence or defend any action, &c. in the Court called the County Court, who is not legally admitted an attorney according to the 2 Geo. 2, c. 23, s. 1. Then, coupling the two enactments together, an attorney who practises in the County Court, must be an attorney of one of the Courts referred to in the 2 Geo. 2, c. 23, s. 23; and an attorney seeking to recover for business done in that Court, must deliver his bill one month before he commences an action.

CROWDER *v.* DAVIES, M. T. 1829. Ex. 3 *Y. & J.* 433—S. P. HAMILTON *v.* PITT, M. T. 1830. C. P. 1 *D. P. C.* 210.

IN an action by an attorney against a bankrupt's assignees for business, the greater part relating to proceedings under the commission—

The Court held, that it was not within the 2 Geo. 2, c. 23, s. 23; and no copy of it signed, necessary to have been delivered according to the provisions of that act:—Held, also, that charges for attending to advise with the solicitor of a creditor as to opposing the bankrupt's discharge from custody, and a like charge as to opposing his discharge under the Insolvent Act, were not taxable charges within the act. Proceedings in bankruptcy are not proceedings in equity, within the statute.

But no bill need be delivered of business in bankruptcy; and the same rule holds as to opposing the bankrupt's discharge from custody*.

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SANDYS *v.* HORNBY, H. T. 1831, N. P. 4 *C. & P.* 520; S. C. 2 *M. & Rob.* 33—S. P. HILL *v.* WEIGHT, H. T. 1838. C. P. 5 *Scott*, 662.

IN an action on an agency bill, it appeared that the defendant was an attorney, and the plaintiffs were his town agents. There was evidence that the business had been done, but there was no proof of the delivery of any bill.

Lord *Tenderden*, C. J.—I am of opinion that the stat. 3 Jac. 1, c. 7, s. 1, does not apply to agency bills, as the words "masters or clients" in that statute, are quite inapplicable to agents.

So, agency bills,

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REYNAL *v.* SMITH, E. T. 1831, K. B. 2 *B. & Ad.* 469; S. C. 1 *M. & Rob.* 85; S. C. 1 *D. P. C.* 334.

THE question in this case was, whether the delivery of the bill before action brought under 3 Jac. 1, c. 7, s. 1, applied to business done in the Lord Mayor's Court by an attorney there, although as an attorney also of the superior Courts.

The Court held the statute did not apply; because the statute was framed with a view to business done in the superior Courts only, and not inferior Courts.

or for business done in inferior Courts, need not be delivered.

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BECKE *v.* WELLS, M. T., 1832, Ex. 1 *Cr. & M.* 75.

A BILL for business done in the Middlesex Court of Requests had not been delivered one month before action. On an objection being taken on that ground—

*Per Cur.*—The question arises on the 2 Geo. 2, c. 23, s. 23; that stat. provides that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, &c., at law or in equity, until the expiration of one month after he shall have delivered his bill, &c. When the case as to business done at the Quarter Sessions came before the Court of King's Bench, that Court at first was of opinion that the bill could not be taxed. Why? Because they thought that there was no officer proper to tax it. Why was that opinion afterwards altered? The reason was,

As in the Court of Requests.

* And it is not necessary for the executor of an attorney to deliver a bill of costs for business done by his testator, one month before the commencement of an action. (*Barrett* v. *Moss*, 1 C. & P. 3).

So, a bill need not be delivered, in pursuance of the statute, where the charge is for attendances and advising after the conclusion of an action. (*Coleridge*, J.—*Pepper* v. *Yeatman*, T. T. 1836, B. C., 5 D. P. C. 155).

as stated by Lord Kenyon, that the Court was informed that the officer of that Court was in the habit of taxing bills of that description. The Court of Requests has no attornies. From the nature of its business, it cannot be expected that attornies should practise in it.

We are of opinion, therefore, that the bill in this case, is not one which required delivery under the statute.

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LESTER *v.* LAZARUS, M. T. 1835, Ex. 2 *C., M., & R.* 665; S. C. 1 *T. & G.* 123; S. C. 4 *D. P. C.* 397.

So, the delivering of the bill does not apply to the assignee of an insolvent attorney*.

To an action by the assignee of an attorney who had been discharged under the Insolvent Debtors' Act, the plea was that no signed bill of costs had been delivered according to the statutes.

*Per Cur.*—The plaintiff comes within the principle of the cases which have established that the statutes have created a personal prohibition of the attorney to sue before he has performed the condition which does not extend to the executor or administrator. It certainly seems to us that the assignee of an insolvent or bankrupt attorney is within the same principle, and therefore that he is not bound to deliver a signed bill previous to commencing an action.

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SPARROW *v.* JOHNS, E. T. 1838. Ex. 3 *M. & W.* 600; S. C. 6 *D. P. C.* 554.

The statute as to delivery of bills, only applies where the attorney acts "for fee or reward."

A RULE calling upon Armstrong the plaintiff's late attorney in this suit, to shew cause why he should not deliver to the plaintiff, or her husband, a true bill, subscribed with his own hand and name, of all fees, charges, and disbursements in all matters in which he has been concerned for the plaintiff, and why he should not give credit for all sums received. It appeared that Armstrong is the brother of the plaintiff, and has acted throughout the suit for her without fee or reward.

*Per Cur.*—The object of the stat. is that the client is not to have too large a demand made upon him, but here the attorney makes none at all.

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PAINTER *v.* LINSELL, H. T. 1840. C. P. 8 *D. P. C.* 250.

Where an attorney is employed by lender and borrower of money, the latter made the agreement between them to pay the attorney, he may, if there be any taxable item, compel the delivery of the bill to be taxed, although, in the course of the transaction, another attorney is employed by him.

A JUDGE had made an order for the delivery of an attorney's bill of costs to his client, pursuant to the 2 Geo. 2, c. 23, s. 28. It appeared, in the affidavits, that the attorney had been employed to prepare deeds for securing the payment of an annuity by L. & P.; the terms of an agreement prepared by him being, that L. should pay all the expenses relating to the transactions.

The Court were of opinion, that, although another attorney was employed by L. to witness the execution of a warrant of attorney in his behalf. In the course of the arrangement the attorney first engaged was compellable to deliver his bill to L. for the purpose of taxation, the whole nature of the business shewing that the attorney was employed on behalf and on the part of both parties, either of whom, or both, might have been sued.

* Or, where the client himself becomes an attorney. (*Winsor* v. *Herbert*, H. T. 1841, B. C., 9 D. P. C. 237). But where an attorney brought an action in the name of the executor, for the benefit of persons entitled under an agreement to share the sums recovered:—Held, that he must still deliver his bill. (*Coleridge, J.—In re Masters*, T. T. 1835, B. C., 4 D. P. C. 18).

3. *Delivery of, when and in what Manner enforced*.*

GRIPPER *v.* COLE, E. T. 1825. Ex. 11 *Price*, 593.

THE former attorney's bill was not delivered to the present attornies of the defendant, pursuant to an order, on account of the illness of one of the former. A rule for an attachment against the former for not delivering his bill of costs, was discharged, the bill having been delivered since the service of the rule.

An attachment lies for not delivering a bill pursuant to an order.

*Per Cur.*—Such a rule for an attachment is not absolute in the first instance.

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POTTER *v.* BACK, M. T. 1840. Ex. 8 *D. P. C.* 872.

AN attorney, by rule of Court, had been ordered to deliver a bill of costs within a certain time. Not having done so, an application was made for an attachment, supported by an affidavit, not made by the party himself, but by his clerk.

But the affidavit in support of the attachment, must be made by the party himself.

The Court refused the attachment, because the affidavit should have been made by the party himself.

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*In re* LORD CARDROSS, M. T. 1839. Ex. 5 *M. & W.* 545; S. C. 8 *D. P. C.* 861.

THIS was an application to compel H. & B., attornies of the Court, to deliver their bill to the administrator of their client. The common law business, however, had all been done in the Palace Court, and removed into the Queen's Bench.

And an application to compel an attorney to deliver his bill, must be made to the court in which some of the business is done, and the affidavit entitled in that court.

*Per Cur.*—The construction given to the 2 Geo. 2, c. 23, s. 22, renders it imperatively requisite that some portion of the business should be done in the Court in which the application is made, and the affidavit must be entitled in such Court.

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(*b*) RESPECTING THE TAXATION OF BILL†.

1. *When the Bill is or is not to be taxed.*

DAGLEY *v.* KENTISH, E. T. 1831. K. B. 2 *B. & Ad.* 411; S. C. 1 *D. P. C.* 330.

IN an action on an attorney's bill, containing no taxable item, after a tender and plea, the defendant moved to refer the bill for taxation, and to stay proceedings, upon payment of the amount

Unless a bill be taxable under the 2 Geo. 2, the Court will

* An order to re-deliver bills of costs will not be made after a lapse of nine years in the absence of fraud or overcharges. (*Williams*, J.—*Manning* v. *Brown*, M. T. 1834, B. C., 3 D. P. C. 31). So, the Court will not order an attorney to deliver his bill, or refund, after the lapse of thirteen years, on the ground that the business done was illegal. (*Littledale*, J.—*Ex parte Yeatman*, M. T. 1835, B. C., 4 D. P. C. 304).

† The Court's authority to order taxation is under the statute, and must be controlled by the conditions imposed thereby; and if the client has omitted to give the required undertaking its jurisdiction may be objected to. (*Coleridge*, J. *Howard* v. *Groom*, T. T. 1835, B. C., 4 D. P. C. 21). A solicitor to a commission of bankrupt may maintain an action for the amount of his bill up to the choice of assignees, without having had his bill taxed by the commissioners, under sect. 14 of the Bankrupts' act, 6 Geo. 4, c. 16, that provision applying only to cases between the assignees and the estate. (*Park*, J.—*Taylor* v. *M'Gaugan*, M. T. 1829, N. P., 4 C. & P. 96. (*Vaughan*, B.—*Fisher* v. *Filmer*, T. T. 1831, N. P., 5 C. & P. 92).

not exercise their supposed power at common law.

taxed, and of costs, if the Master found a sum beyond the amount tendered.

The Court held, after conferring with the rest of the Judges, that so much doubt was entertained on the point, that it could not send the bill for taxation, as they would not exercise any supposed power they may have at common law to tax an attorney's bill, independent of the power given by 2 Geo. 2, c. 2, s. 23.

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*Ex parte* KING, E. T. 1834. K. B. 3 *N. & M.* 437; S. C. 3 *D. P. C.* 41—S. P. DOE *d.* PALMER *v.* ROE, T. T. 1835. B. C. 4 *D. P. C.* 95.

In fact, no general power is possessed by the Court to order taxation.

IN this case, *Littledale*, J., said that the Court has no general power to order a bill to be taxed; and that this had been frequently decided.

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JAMES *v.* CHILD, T. T. 1832. Ex. 2 *Trw.* 732; S. C. 2 *C. & J.* 678.

Part of a bill being taxable, subjects the whole to taxation*.

AN attorney having transacted common law as well as conveyancing and other business not taxable, was refused payment, in respect of a part of the conveyancing business, before he had sent in any bill thereof, to other parties also concerned; he then delivered a bill for all the common law business (except some agency charges, which, it was stated, he could not insert), which his client examined and admitted to be correct; and, on application for payment, directed the attorney to borrow for him a sum of money, which was accordingly done, and credit given to him, in account, for that amount. Subsequently, on failing to obtain payment of any part of his charges for conveyancing, the attorney brought an action for the residue of his demand.

The Court held, that he had no right to separate the common law and conveyancing bills, and to appropriate the sum credited in discharge of the former; and, therefore, that he could not sustain an action without delivering a signed bill, pursuant to the statute.

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SMITH *v.* TAYLOR, H. T. 1831. C. P. 7 *Bing.* 259; S. C. 5 *M. & P.* 66: S. C. 1 *D. P. C.* 212.

Attending and advising steps in defence of an action, though money be advanced.

ACTION by an attorney. The plaintiff's demand consisted (among other things) of the following items:—

"Nov. 6th.—You having been served with a writ, after paying the amount of debt, attending you, conferring and advising thereon, 6*s.* 8*d.*

"Dec. 10th.—Attending you, advising you on the action that had been brought against you at the suit of Mather, and advising, 6*s.* 8*d.*"

The plaintiff not having delivered a bill a month previously to the commencement of the action, in pursuance of the statute 2 Geo. 2, c. 23, s. 23, it was objected, on the part of the defendant, that the plaintiff was not in a situation to recover. Lord Chief Justice *Tindal*, before whom the cause was tried, inclining to this opinion, the

* For an attorney cannot split his demand, where part is taxable and part not. (*Tenterden*, C. J.—*Thwaites* v. *Mackerson*, T. T. 1828, N. P., 1 M. & M. 199; S. C. 3 C. & P. 341).

plaintiff called a witness to prove that he, the plaintiff, had lent the defendant 3*l.* to pay the costs in Mather's action; but his Lordship did not think this proof altered the case. A nonsuit was thereupon entered. On motion to set it aside—

The Court concurred (*Alderson*, J., dissent.) with the Chief Justice.

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FEARNE *v.* WILSON, M. T. 1826. K. B. 6 *B. & C.* 86; S. C. 9 *D. & R.* 157.

IN an action on an attorney's bill, one item was: "Yourself at suit of F.; attending you on your being arrested; advising you on the subject of the action, and filling up the bail-bond to the sheriff, in order to your discharge." or charges for attending bail and filling up a bail-bond*;

The Court thought that, as the attorney had charged for filling up the bail-bond in the action, he had adopted a proceeding in the cause; and, therefore, his bill was liable to taxation.

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WARDLE *v.* NICHOLSON, H. T. 1833. K. B. 4 *B. & Ad.* 469; S. C. 1 *N. & M.* 355.

AN attorney's bill contained an item for preparing a replevin-bond in the County Court. The question was, whether the bill was taxable. or business done in the County Court, are taxable.

*Per Cur.*—The statute of 22 Geo. 2, c. 23, s. 1, directs that no person shall be permitted to act as an attorney in the Courts of King's Bench, Common Pleas, Exchequer, and other Courts of Record, wherein attorneys have been accustomably admitted and sworn, unless he shall have been so sworn, admitted, and inrolled in the said respective Courts. Therefore, the liberty to practise in those Courts is confined to persons who have been regularly admitted. But the 23rd section says, "no attorney or solicitor of any of the Courts aforesaid shall commence any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until" &c. This clause, in respect to business done, is not confined to the same Courts, but extends generally to all business, either at law or in equity; and it has been determined that Courts of Quarter Sessions fall within its provisions. Then the question is, whether business done in County Courts is within the act. The 12 Geo. 2, c. 13, s. 7, directs that no person shall act as an attorney in the County Courts of England, unless he shall have been legally admitted as an attorney or solicitor, according to the act of 2 Geo. 2, c. 23. Coupling the two statutes together, we must say, that a County Court is a Court requiring both admission and taxation.

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SADLER *v.* PALFREYMAN, T. T. 1834. K. B. 3 *N. & M.* 599; S. C. 1 *Ad. & E.* 717.

TWO actions being depending, in one of which S. was the plaintiff and P., C., and W., the defendants, and in the other, the defendant and C. and W. the plaintiffs, it was agreed between all the So, a compromise, and that costs be paid as between attor-

* Or for endeavouring to settle by cognovit. (*Best*, C. J.—*Watt* v. *Collins*, T. T. 1825, N. P., 2 C. & P. 71; S. C. 1 R. & M. 284). So, the Court ordered an attorney's bill to be taxed, because it contained items for drawing a warrant of attorney, although it had not been executed. (*Wilson* v. *Gutteridge*, T. T. 1824, K. B., 3 B. & C. 157; S. C. 4 D. & R. 736).

ney and client, does not preclude taxation.

parties, that Sadler should receive 10*l.* in full of all damages, and that P., C., and W. should pay his costs in both actions, to be taxed as between attorney and client. The bill of costs of Sadler's attorney was taxed under a Judge's order, and more than one-sixth struck off; and, by an order of the Court, it was referred to the Master to tax P., C., and W. their costs; and the costs having been taxed, in pursuance of that order, a rule had been obtained, calling on the defendants to shew cause why the rule for taxing the costs of taxation and all further proceedings thereon should not be set aside for irregularity.

*Per Cur.*—It will be best to consider the question as if there had been only one, and a compromise of that, the defendants agreeing to pay the plaintiff's costs. The defendants, then, are the persons chargeable with those costs within the express words of the statute, and more than one-sixth having been struck off, they are entitled to make this application.

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*Ex parte* Bowles, E. T. 1835. C. P. 1 *Bing. N. S.* 632; S. C. 1 *Scott*, 583, *overruling* Wilson *v.* Gutteridge, T. T. 1824. K. B. 3 *B. & C.* 157.

So, searching for judgment.

On motion that an attorney's bill should be referred for taxation, on the ground of the client being charged with the expenses of searching for judgments, which was contended brought the case within the 2 Geo. 2, c. 23. *Wilson* v. *Gutteridge* was relied on, where, though all the items, except three, relating to a warrant of attorney, were agreed to be out of the statute 2 Geo. 2; yet the Court made the rule for taxation absolute, saying they had a paramount jurisdiction, independently of the statute, to refer an attorney's bill for taxation.

*See* 2 *C. & P.* 45; *S. C. R. & M.* 262.

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*In re* Rice, E. T. 1837. C. P. 4 *Scott*, 416.

But advising as to its revival*,

On the question, whether a charge for searching for an old judgment in this Court and advising as to its revival, was within 2 Geo. 2, c. 23, s. 23, so as to be taxable—

*Per Cur.*—A charge for advising on the revival of an old judgment is certainly one degree removed from anything that has hitherto been held to constitute a taxable item. In *Fenton* v. *Correia*, (2 C. & P. 45; R. & M. 262), charges for searches to see whether satisfaction of a judgment was entered, or whether an issue was entered and docketed, were held not to constitute taxable items in an attorney's bill, and we think the same rule applies.

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*In re* Brandon, E. T. 1837. C. P. 3 *Bing. N. S.* 783; S. C. 5 *D. P. C.* 623, *by name of In re* Branston.

or taking acknowledgments of married women since the 3 & 4 Will. 4,

In this case, the business done was in preparing affidavits verifying the certificate of the taking an acknowledgment of a married woman, under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74; it was admitted that, under the former mode of proceeding in such matters, it was supposed that there was a cause in Court, and the bill would be taxable; but this peculiar jurisdiction, which the Court

* Or searching for entry of issues, or satisfaction, are not taxable. (*Abbott*, C. J. —*Fenton* v. *Correia*, T. T. 1825, N. P., 2 C. & P. 45; S. C. 1 R. & M. 262, cited supra).

formerly had, would not render a bill taxable which contained charges for business done under the altered practice.

*Per Cur.*—This case does not seem to be a suit either at law or in equity.

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*In re* MARRIS, H. T. 1835. K. B. 2 *Ad. & E.* 582.

or charging for an appearance, entered by a proctor, is not a taxable item.

IN this case it was contended that the only part of the attorney's bill that could be presented as taxable, was a charge for business done by a proctor at York entering an appearance; but it was urged, from what was said in *Franklin* v. *Featherstonhaugh, infra,* that that could not be a subject of taxation in this Court.

And of that opinion were the Court.

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NICHOLAS *v.* HAYTER, M. T. 1834. K. B. 2 *Ad. & E.* 349.

So, where an attorney, employed to transfer stock, found a distringas lodged:—Held, that his inquiries respecting it were not items taxable.

IN an action on an attorney's bill, it appeared that the plaintiff being employed to transfer stock, found that a distringas had been entered at the Bank to prevent the transfer. He thereupon made several inquiries respecting the transactions on behalf of his client, and prepared a notice to the solicitor of the Bank to file a bill, in consequence of the writ being entered. On the question, whether the items were taxable—

The Court held, that the charges for this business were not taxable items between him and his client, it not appearing that the distringas originated in any suit, or that the business had reference to any proceeding in a Court.

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WEYMOUTH *v.* KNIPE, H. T. 1837. C. P. 3 *Bing. N. S.* 387; S. C. 3 *Scott,* 764; S. C. 5 *D. P. C.* 495.

So, an agent's bill with his attorney cannot be taxed*.

IN an action by an attorney to recover the balance of bills of costs for agency business done for the defendant, another attorney, the defendant had taken out a summons for the purpose of having the bills of costs taxed; but *Park,* J., refused to make an order for that purpose, on the ground that the act of Parliament, 2 Geo. 2, c. 23, did not extend to bills of fees, &c., due from one attorney to another attorney. On a rule obtained for the same purpose—

The Court were of opinion that the rule should be discharged, as they thought that the authority conferred upon them to refer an attorney's bill for taxation was statutable; and the words of the 6th section of 12 Geo. 2, c. 13, exempting bills like the present from the operation of 2 Geo. 2, c. 23, s. 23, were imperative and binding.

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FRANKLIN *v.* FEATHERSTONHAUGH, T. T. 1834. K. B. 1 *Ad. & E.* 475; S. C. 3 *N. & M.* 779.

Money paid by an attorney to a proctor is an item properly included in his bill as a disbursement†.

IT appeared that the defendant having been guilty of a contempt, in refusing to give evidence before the Ecclesiastical Court, had been forced to employ a proctor, who was paid by the defendant's attorney; and the sum so paid formed an item in the attorney's bill.

* Where the executor of an attorney delivers his bill before action brought, it cannot be taxed. (*Patteson,* J.—*Doe* d. *Sabin* v. *Sabin,* E. T. 1840, B. C., 8 D. P. C. 468).

† The adverse party cannot object, on the taxation of costs, that the other professional adviser was not an attorney. (*Parke,* J.— —— v. *Sexton,* H. T. 1832, B. C., 1 D. P. C. 180).

The Master, considering this a disbursement, had allowed that item, and refused to enter into the items composing that sum in the proctor's bill; by that means, one-sixth not having been struck off, the Master allowed the attorney his costs of taxation.

*Per Cur.*—It appears to us, that this item should be considered as a component part of the bill. The Master appears to have looked at it as a disbursement by the attorney to the proctor, made by him in the course of his employment; and that is the right mode of looking at it.

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### 2. *By what Court referred, and Order for*.*

*Ex parte* KING, E. T. 1834. K. B. 3 *N. & M.* 437.

An application to tax must be made to the Court in which the business was done*,

MOTION to tax costs. In each of the bills of costs there was a charge "for preparing and ingrossing a warrant of attorney as a collateral security;" but it did not appear, either from the bills of costs, or from the affidavits filed in support of the rule, in what Court the warrant authorized the entering up judgment. It was contended, that it did appear that the parties against whom the application is made are attornies of this Court.

But the Court concurred in the objection.

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BASSETT *v.* GIBLETT, E. T. 1834. Ex. 2 *D. P. C.* 650.

and should be made at Chambers.

ON a rule to shew cause why an attorney's bill should not be taxed—

*Parke*, B., said—Such an application ought to be made at chambers; and refused the rule.

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JONES *v.* BYEWATER, E. T. 1832. Ex. 2 *C. & J.* 371; S. C. 2 *Tyrw.* 402; S. C. 1 *D. P. C.* 557.

Application to tax a bill, in case of lunacy, must be made to the Chancellor, and not to a court of law.

THE bill in this case was for suing out and prosecuting a commission of lunacy, whereon the inquisition returned that the party was not lunatic. On motion to tax the bill—

*Per Cur.*—We think it unnecessary to decide whether this bill is taxable; as, if taxable, it may, on application to the Lord Chancellor, be referred by him to the proper officer of the Chancellor for taxation, who will be better able to understand the way in which it ought to be taxed, being more conversant with proceedings in lunacy. We do not decide the question, but consider the application had better, in preference, be made to the Chancellor than to this Court.

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WATSON *v.* POSTAN, E. T. 1832. Ex. 2 *C. & J.* 370; S. C. 2 *Tyrw.* 406; S. C. 1 *D. P. C.* 556.

An order to tax,

ON a summons, by one of two defendants, after an action com-

* The rule for referring it to the Master to tax the costs of taxation against an attorney, is absolute in the first instance; and the form of the rule is, that the attorney shall pay the costs, when taxed, to his client. (*Per Littledale*, J.—*Neale* v. *Postlethwaite*, M. T. 1839, Q. B., 8 D. P. C. 101).

† Where the Common Pleas refers bills of costs for taxation to the prothonotary, and some of the bills are for business done in the King's Bench, and the prothonotary applies to a Master to tax the bills in the King's Bench, the Court of King's Bench will not interfere. (*In re Jones*, T. T. 1832, K. B., 1 D. P. C. 424).

menced on an attorney's bill to have such bill referred to the Master for taxation, an application was made to discharge the judge's order, because there was no undertaking to pay the taxed costs.

pending an action, is a common-law power; and, therefore, the Court may impose what terms they please;

*Per Cur.*—The act of Parliament applies where no action is depending. Here there was an action depending; and, therefore, the order was made, not under the provisions of the act, but pursuant to the powers possessed by the Court at common law; and the Court may mould its orders as it thinks proper.

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CLARKSON *v.* PARKER, M. T. 1838. Ex. 4 *M. & W.* 532; S. C. 7 *D. P. C.* 87.

but the power of the Court to order the delivery of an attorney's bill, independent of the 2 Geo. 2, does not apply to taxation.

ON a rule to shew cause why an order of *Alderson*, B., should not be rescinded, by which, on the application of the assignees of a bankrupt, it was ordered that one Archer, the bankrupt's attorney, should, within three weeks, deliver his bill of costs for all business done for the bankrupt up to September 14th, and that the bill should be referred to the Master for taxation, the assignees undertaking to pay rateably to Archer, with the other creditors, a dividend upon the estate of the bankrupt, and that the attorney should account for all monies received on behalf of the bankrupt, retaining his lien on all papers in his custody; it was contended that the business done was not of such a nature as to give the Court jurisdiction under 2 Geo. 2, c. 23, s. 23.

The Court held that they had a general jurisdiction, independently of the stat. 2 Geo. 2, c. 23, s. 23, to order an attorney to deliver a bill of costs to his client and account for monies received, although they *have no power to order* it to be taxed, except in the cases provided for by that act.

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HEAD *v.* BALDRE, T. T. 1838. Q. B. 8 *A. & E.* 605.

Before taxation, the Court will not lay down any rule to be adopted on taxation.

ON motion to tax costs, and also to name the principle upon which they should be taxed, it was contended that the application was premature, inasmuch as the Master on taxation might take the view which the defendant contended was the correct one, in which case the application would be unnecessary.

*Sed per Cur.*—Parties may find it convenient to agree to such a course, but the Court cannot, if the objection be before them, anticipate the decision of the Master, and presume that he will decide erroneously.

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THOMPSON *v.* CARTER, E. T. 1835. Ex. 3 *D. P. C.* 657.

An order to tax will not be rescinded where made a rule of Court, and after demand and attachment issued.

ON motion to set aside a judge's order to tax, it was contended that this motion came too late, the order having been made on the 3rd of April, since which it had been made a rule of Court, in the present term, and upon that a demand of costs had been made, and attachment issued.

*Per Cur.*—This application should have been made sooner. It is too late. The defendant has allowed the other side to go on and incur expenses.

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### 3. *At whose Instance.*

CLUTTERBUCK *v.* COOMBS, T. T. 1833. K. B. 2 *N. & M.* 209; S. C. 5 *B. & Ad.* 400.

An attorney's

ON motion for a rule for the taxation of an attorney's bill of

costs cannot be taxed at the instance of a third party;

costs, at the instance of a third party, who made the application simply for the collateral purpose of reducing the bill so low as to make him a bad petitioning creditor—

*Per Cur.*—It cannot be right for a third party to apply to tax the costs when the party himself has acquiesced.

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HOBBY *v.* PRITCHARD, M. T. 1836. Ex. 2 *M. & W.* 124; S. C. 5 *D. P. C.* 301.

nor can an order to tax be obtained by one of several joint plaintiffs.

A JUDGE'S order had been obtained by the plaintiff, H., to refer the bill of the attorney for the plaintiffs to the Master to be taxed, on the undertaking of H. alone. There were other plaintiffs beside H. On a rule to rescind the order—

*Per Cur.*—We cannot tell whether the other party admits the retainer or not, for he is not before the Court; nor can it be contended that, in consequence of a joint retainer, one can bind the other so as to render him liable to the process of attachment. That cannot be.

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4. *At what Time.*

GLASSCOTT *v.* CASTLE, H. T. 1832. Ex. 2 *C. & J.* 355; S. C. 2 *Tyrw.* 302; S. C. 1 *D. P. C.* 317.

Fraud is a ground for referring a bill to be taxed after payment*, within a reasonable time.

MOTION for taxation of costs after payment. It was contended, that, after payment of an attorney's bill of costs, special circumstances, such as fraud or imposition, must be shewn, to entitle a party to refer the same bill for taxation.

*Per Cur.*—If made within a moderate period, Judges at Chambers are in the habit of directing a bill to be taxed as a matter of course. If delay has occurred, then the party who applies must shew fraud or imposition.

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*Ex parte* SHIPDEM, T. T. 1825. K. B. 6 *D. & R.* 339.

And even, it appears, after a lapse of seven years†.

AFTER the lapse of seven years, an application was made, calling on an attorney to deliver up certain papers and writings, pay over certain sums of money alleged to be in his hands, belonging to a client, and have his bill of costs referred to the Master to be taxed.

*Sed per Cur.*—The party applying must point out some fraud in the transactions, in order to induce the Court to interfere. Here no fraud or misconduct is suggested, more than seven years have elapsed since the transactions have been closed and adjusted. We cannot interfere.

* Though the Court reluctantly ordered the bill to be taxed after a verdict for the full amount. (*Nuttall* v. *Marr*, 3 D. & R. 33).

† Although the Court will not re-open and disturb long-settled accounts between attorney and client; yet they will allow the latter to surcharge and falsify items of charge, and will grant an issue at law to try the fairness of such impugned charges, even where founded on bonds, and where the bill of costs had been settled and paid, after being delivered to the attorney of the heir of a surviving trustee, who had power to act and been approved of by him. The Court, in the absence of any specific ground to impeach the bill either by fraud or mistake, or gross overcharge, discharged an order for referring it for taxation. (*Wilkinson*, dem. *Foster*, vouch. 7 *Moore*, C. P. 496).

After the lapse of four years the bill may be taxed, though there has been part payment, or an expression of satisfaction. (*Coleridge*, J.—*Woollaston* v. *Weston*, T. T. 1835, B. C., 4 D. P. C. 3).

GROVER *v.* HEATH, M. T. 1833. Ex. 2 *D. P. C.* 285.

So, an attorney's bill may be taxed after payment, with a view of sustaining an action for contribution by one of several plaintiffs;

SEVERAL persons had agreed with the plaintiffs to share the expenses. The decision of the House of Lords was given in July 1832. The costs amounted to 466*l.*, and an application was made in February of the present year, to the defendant, for his share of the costs. In April, a writ of summons issued, and an order for taxing the costs of Grover, Smith, and Grover, the plaintiffs' attornies, was applied for. That was before the time for pleading was out. Since then, on June 18th, after term, the defendant paid the full amount into Court. On motion, to tax the plaintiffs' bills of costs, the affidavit of the defendant stated his belief, that the charges were exorbitant, and that a great part would be taken off, and that it was essential with a view to contribution.

The Court granted the application.

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WILLIAMS *v.* GRIFFITH, E. T. 1840. Ex. 8 *D. P. C.* 414.

or, after action brought.

ACTION on an attorney's bill, containing several taxable items. After action brought, motion was made to have the bill taxed.

*Per Cur.*—In all cases where the bill contains taxable items, even after action brought, the bill will be referred to be taxed. But where it contains no such items, the Court will not interfere.

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### 5. *Notice of**.

WILKINS *v.* PARKINS, H. T. 1837. Ex. 2 *M. & W.* 315.

A copy of the bill and affidavit of increase must be delivered with the notice of taxation, under Rule M. T. 1 W. 4.

ON a rule to set this taxation aside, on the ground that no copy of the bill of costs and affidavit of increase had been served with the notice of taxation, as required by the rule of this court, Mich. 1 Will. 4, No. 10, it was contended, that it was not usual to deliver it, unless it is required; if not required, it is given to the party before the Master.

*Sed per Cur.*—In that case there is a waiver of the rule. But how can you get over it without a waiver? And, as the party did not attend the taxation, the rule has not been waived.

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### 6. *When to be reviewed.*†

LEAVER *v.* WHALLEY, T. T. 1833. Ex. 2 *D. P. C.* 80.

So, the rule that an attorney

THE defendant was an attorney at S., and acted as his own attorney in the cause, though he employed an agent in London; and,

* It is ordered, that before taxation of costs one day's notice shall be given to the opposite party. Rule H. T. 2 Will. 4.

† What proceedings were necessary is for the Master to decide. (*Patteson*, J.—*Heald* v. *Hall*, T. T. 1833, B. C., 2 D. P. C. 163). Hence, whether the attendance of a country attorney in London be essential or not at a trial must be decided by the Master. (*Taunton*, J.—*Parsloe* v. *Foy*, T. T. 1833, K. B., 2 D. P. C. 181). But, on taxation, the Master has no right to inquire whether there was an agreement to do the business out of pocket. (*Bailey*, B.—*Evans* v. *Taylor*, H. T. 1834, Ex., 2 D. P. C. 349). If a bill, not taxable, be referred, the Court will inquire if the prothonotary has accepted the usual rule. (*Broadhurst* v. *Darlington*, E. T. 1833, Ex., 2 D. P. C. 38). And the taxation can only apply to the costs, and not to the sum paid over to the attorney for his client. (*Woollison* v. *Hodgson*, M. T. 1834, Ex., 2 D. P. C. 360). After a review of toxation, the

is entitled to a guinea a-day for attendance does not apply where he acts as his own attorney, unless his personal attendance was indispensable.

when the cause was coming on for trial, he came to London with a witness, and obtained a verdict. The Master on the taxation of costs only allowed to the defendant the common expenses of a witness, and of travelling to London and back. On motion to review the taxation—

*Per Cur.*—An attorney who is party to a suit is not entitled to charge a guinea a-day for attending the trial, though he acts as his own attorney, unless it appears that it was necessary he should attend in person.

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CAPEL *v.* STAINES, T. T. 1837. Ex. 2 *M. & W.* 850; S. C. 5 *D. P. C.* 770.

On taxation only, one letter before action will be allowed*.

ON motion for the Master to review his taxation of costs, it appeared that the defendant had made an earnest request to have time given him, and wrote to the plaintiff's attorney for that purpose, and that in the course of the correspondence several letters had passed.

*Per Cur.*—The rule upon this subject is settled; that is, to allow for one letter, and one letter only, before action brought.

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### 7. *How waived, and Effect of*†.

DRAX *v.* SCROUPE, T. T. 1831. K. B. 1 *D. P. C.* 69; S. C. 2 *B. & Ad.* 581.

Taxation of costs cannot be waived by an understanding to charge specific sums.

THE plaintiff agreed to pay his attorney five guineas a day for journeys, besides expenses; he had paid bills sent into him at that rate; and the Master, upon taxing subsequent bills, allowed at that rate; and the plaintiff paid the amount of the Master's allocatur, and several months afterwards applied to the Court for a rule to review the Master's taxation.

*Per Cur.*—It appears to us, that agreements of this sort ought to be viewed by the Court with very great jealousy; but as it does not appear that the Master thought himself bound by the agreement, but that he exercised his discretion as to the amount of charges he ought to allow, we think we ought not to interfere.

Court will not order two sums to be struck out which were introduced as disbursements. (*Coleridge*, J.—*Harrison* v. *Ward*, T. T. 1835, B. C., 4 D. P. C. 39). But where charges are made for attendance on certain days, and, at the end, for several attendances, the Court ordered them to be struck out. (*Rownson* v. *Earl*, T. T. 1829, N. P., 4 C. & P. 44). So, five guineas, as a retaining fee will not be allowed against a candidate at an election. (*Williams*, J.—*Parker* v. *Robinson*, 1835, N. P., 7 C. & P. 241).

* In the Exchequer, where a subpœna was issued, although no information was actually filed, the clerk in Court was entitled to a term fee, but not exceeding the ancient fee of 3*s.* 4*d.* (*Attorney-General* v. *Munday*, 2 C. & J. 347; S. C. 2 Tyrw. 305).

† If, on taxation, a party waives the delivery of a signed bill, he also waives the operation of the 2 Geo. 2, c. 23, with respect to the costs of taxation. (*Gerrard* v. *Arnold*, H. T. 1838, Ex., 6 D. P. C. 336). Where, on taxation, it appears that an attorney has been overpaid by his client, but the usual clause requiring the attorney to refund any sum found to have been overpaid is omitted in the order for taxation, the Court will not afterwards supply the omission. (*Patteson*, J.—*Peace* v. *Jones*, H. T. 1840, B. C., 8 D. P. C. 314).

8. *Costs of Taxation, and by whom paid.*

BAKER *v.* WILLS, H. T. 1834. Ex. 2 *C. & M.* 415—S. P. GALE *v.* PAKINGTON, E. T. 1825. Ex. 1 *M. & Y.* 354.

Where nearly one-sixth is taken off, the Master may refuse the costs of taxation.

ON a rule to shew cause why the Master should not allow the costs of taxation. It appeared that one-sixth had been nearly taken off; 42*l.* being taken off 272*l.*

*Per Cur.*—We think that the Master was fully justified in refusing the attorney his costs, as so large a sum was taxed off. When the attorney made this application, he knew how much had been taken off his bill, and he made the motion at his peril. If a sixth be taken off an attorney's bill, it is imperative on him to pay the costs; but, if less than a sixth, it is discretionary with the Court to allow him the costs.

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ROGERS *v.* PATERSON, H. T. 1839. Ex. 4 *M. & W.* 588.

To render an attorney liable to costs of taxation where one-sixth is taken off, there must be a submission by the party to the bill, or money brought into court to meet it*.

THE plaintiff's attorney was ordered to deliver his bill to be taxed, and more than one-sixth being taxed off, application was made that the plaintiff should be allowed the costs of the taxation; and opposed, on the ground that the rule for taxation did not contain the usual undertaking to pay the bill of costs, or what might be found due.

*Per Cur.*—To be within the statute there must be either an undertaking to pay the bill, or money must be brought into Court, and agreed by the party to whom it belongs to be appropriated for that purpose.

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HOLDERNESS *v.* BARKWORTH, H. T. 1838. Ex. 3 *M. & W.* 341; S. C. 6 *D. P. C.* 392.

If the bill contain items which ought not to have been charged, the costs of taxation will be refused.

IN this case the Court said that the 2 Geo. 2, c. 23, s. 23, directing taxation of costs, is not reciprocal. It does not necessarily follow that the defendant is to pay the costs of taxation, though less than one-sixth be struck off; though, if more be disallowed, it is obligatory upon the plaintiff's attorney to pay the costs. With regard to the defendant, the Court has a discretion, which they may exercise, upon reference to the reasonableness or unreasonableness of the items of the bill. The attorney ought not to put down one shilling more than he is entitled to. Here are some items that should never have been charged, and which the party must or ought to have known could not be charged. If any improper charges are wilfully included, though one-sixth be not struck off, the attorney ought not to have his costs.

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HIGGINS *v.* WOOLCOTT, T. T. 1826. K. B. 5 *B. & C.* 760; S. C. 8 *D. & R.* 589, *by name of* DICKENS *v.* WOOLCOT.

Aliter, where one-sixth is disallowed,

ON motion for the Master to review his taxation it appeared that an attorney's bill having been referred to the Master to be taxed,

* But, in another case, it was held, that an attorney must pay the costs of taxation if more than one-sixth is taxed off, although his client has not paid the amount of the taxed costs. (*Littledale*, J.—*Neale* v. *Postlethwaite*, M. T. 1839, B. C., 8 D. P. C. 100).

he struck off more than one-sixth, and allowed the client the costs of the taxation.

*Per Cur.*—By the stat. 2 Geo. 2, c. 23, s. 23, the client was entitled to the costs of the taxation. The words are, "And the said respective Courts are hereby authorized to award the costs of such taxations to be paid by the parties according to the event of the taxation of the bill; that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the attorney, or solicitor, is to pay the costs of the taxation; but if it shall not be less, the Court, in their discretion, shall charge the attorney, or client, in regard to the reasonableness or unreasonableness of such bill."

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HOLMES *v.* EDWARDS, H. T. 1836. C. P. 2 *Scott*, 845.

unless there be an offer to reduce before taxation.

AN offer had been made to dispense with taxation, provided a certain sum were deducted from the bill; and, on the taxation, the bill was reduced by nearly the sum mentioned, though less than one-sixth of the bill.

*Per Cur.*—The costs of taxation having been rendered necessary by the non-acceptance of the offer of reduction, we think those costs should be paid by the party by whom they were occasioned.

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MORRIS *v.* PARKINSON, E. T. 1835. Ex. 2 *C., M., & R.* 178; S. C. 3 *D. P. C.* 744.

But, if the Master disallows one-sixth, because proceedings have been improperly taken, attorney must pay costs of taxation.

ON the taxation of the plaintiff's bill of costs, the Master decided that one of the actions in which the costs were incurred had been improperly brought, which costs he disallowed, whereby more than one-sixth was deducted from the bill. On motion to review the taxation—

*Per Cur.*—We think an attorney ought not to put a disputable item into the bill; but if he does, and it is disallowed, he ought to pay the costs of taxation.

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BENTON *v.* BULLARD, E. T. 1828. C. P. 4 *Bing.* 561.

The rule as to one-sixth being taken off on taxation does not apply to a taxation after action brought.*

AFTER action brought on an attorney's bill, the defendant obtained an order to tax, and more than a sixth was struck off it. The prothonotary observed that he had pursued the uniform course, which was not to allow such costs where the order to tax is applied for after an action has been commenced for the bill.

*Per Cur.*—The point has been repeatedly determined before, and we must adhere to the practice of the Court.

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JAY *v.* COAKS, M. T. 1828. K. B. 8 *B. & C.* 635; S. C. 3 *M. & R.* 35—S. P. HARBIN *v.* MILES, T. T. 1829, K. B. 9 *B. & C.* 755.

And the Court of King's Bench

AFTER the commencement of the action the defendant obtained an order for the taxation of the bill, and, in the result, more than a sixth was taken off. Whereupon a question was raised, whether the attorney, under the provisions of the 2 Geo. 2, c. 23, s. 23, was liable to pay the costs of the taxation.

* And where, after commencement of suit, an attorney's bill is taxed, and reduced less than one-sixth, but the defendant succeeds on a plea of set-off, still he is not entitled to the costs of taxation. (*Patteson*, J.—*Wilson* v. *Knapp*, E. T. 1840, B. C., 8 D. P. C. 426).

*Per Cur.*—We have considered this case, and have looked into the act of Parliament; and, on the authority of a case in the Court of Common Pleas, to which we have been referred, *Benton* v. *Bullard*, vide ante, 506, we are of opinion that the client is not entitled to charge the attorney with the costs of the taxation.

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ROBINSON *v.* POWELL, M. T. 1839. Ex. 5 *M. & W.* 479.

AFTER action brought, the costs were taxed, and more than one-sixth taken off. It was contended, that the attorney was liable to the costs of taxation.

and the Court of Exchequer have concurred in that decision.

*Sed per Cur.*—The case of *Benton* v. *Bullard*, ante, 506, is an express authority to shew that the client is not entitled to the costs of taxation though more than a sixth is taxed off, unless the application to refer the bill to taxation be made before action brought.

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TOOMER *v.* FULLER, T. T. 1833. K. B. 2 *D. P. C.* 195.

AN attorney brought an action to recover the amount of his bill. Previous, however, to the writ issuing, a summons had been taken out to tax.

Though it does not necessarily subject him to the costs of taxation.

The Court referred the rule to the Master, to ascertain whether the writ had been issued merely for the purpose of avoiding the costs of taxing the bill. If he should be of opinion that the writ was issued for that purpose, then the attorney must pay the costs of the taxation; if not, then the client.

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MILLS *v.* REVETT, T. T. 1834. K. B. 1 *A. & E.* 856; S. C. 3 *N. & M.* 767—S. P. WHITE *v.* MILNER, 2 *H. Bl.* 357.

THE stat. 2 Geo. 2, c. 23, s. 23, directs, "That where an attorney's bill on taxation has been reduced by less than a sixth, the Court, 'in their discretion,' shall charge the attorney, or client, with the costs of taxation." On a taxation of an attorney's bill, as between attorney and client, the Master struck off a part of the charges, on the ground that the client is not the person liable for such part.

Where part of the bill is disallowed on account of non-liability, it is not within the rule as to one-sixth being taken off.*

The Court held, that the sum upon which the sixth is to be calculated, under stat. 2 Geo. 2, c. 23, s. 23, is the original bill reduced by the part so disallowed, and the disallowance of such part is not a reduction upon taxation within that clause.

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ELWOOD *v.* PEARCE, M. T. 1831. C. P. 8 *Bing.* 83; S. C. 1 *M. & Scott*, 159; S. C. 1 *D. P. C.* 251.

ON taxation of an attorney's bill, the prothonotary refused to allow the attorney the costs of taxation, although a sixth part had not been taken off. On the question coming before the Court—

Nearly one-sixth being taken off is sufficient to refuse the costs of taxation.

They also refused to interfere, because the deductions amounted to nearly one-sixth part.

* Where an attorney received a bill of exchange for the amount of his bill, and a sixth part was afterwards taken off on taxation, and having paid away the bill, the Court allowed him to pay the costs of taxation to the holder of the bill. (*Woollison* v. *Hodgson*, H. T. 1834, Ex., 2 D. P. C. 351).

FEATHERSTONHAUGH *v.* KEEN, E. T. 1833. Ex. 1 *C. & M.* 495.

Even as regards the assignees of the attorney, a bankrupt.*

IN an action on an attorney's bill, by the assignees of the bankrupt's attorney, an order for taxing the bill was obtained, on an undertaking to pay the amount taxed, with the costs of the action; more than one-sixth of the bill having been disallowed,

Held, that the costs of taxation could not be allowed to the plaintiff as costs in the action.

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HAYS *v.* TROTTER, H. T. 1834. K. B. 3 *N. & M.* 174—S. P. WOOLLISON *v.* HODGSON, H. T. 1834. Ex. 2 *D. P. C.* 360.

And after taxation, and one-sixth taken off, the attorney cannot add an item, which he formerly thought proper to omit.

A DEFENDANT in an action being allowed to pay £48 into Court, gave his attorney £50, that he might do so, which was accordingly done. The bill of costs was afterwards taxed, and more than one-sixth taken off. On motion to review the taxation, the attorney, it appeared, had omitted to enter the disbursement of the £48 paid into Court.

*Per Cur.*—It is attempted, on the part of the defendant's attorney, to make this payment of money into Court as disbursements; but, under the circumstances of this case, that cannot be done. After the attorney had delivered his bill, and has not considered it as a disbursement in the course of the cause, it is incompetent for him afterwards to treat it as such.

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### (*c*) REMEDIES FOR.

#### 1st.—OF THE ACTION FOR, AND ORDER TO TAX AT THE SAME TIME.

SHERIFF *v.* GRESLEY, M. T. 1835. K. B. 5 *N. & M.* 491; S. C. 4 *Ad. & E.* 338—*Overruling*, STEVENSON *v.* WATSON, 1 *B. & P.* 365.

An order to tax, and an action for the costs, cannot be pending at the same time†.

AFTER an order obtained for taxing an attorney's bill, the attorney commenced an action for the costs, and arrested his client, the defendant. On the case coming before the Court, *Stevenson* v. *Watson*, 1 B. & P. Rep. 365, was cited.

But the Court said, in this case there is not merely the fact of an order of taxation pending, but the order has been suspended by the plaintiff himself, and it is not therefore entirely upon the case of *Stevenson* v. *Watson* that the plaintiff proceeded. The question, however, is, whether the authority of *Stevenson* v. *Watson* is good in point of law, and most certainly it appears to us that it is not.

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WILLIAMS *v.* ROBERTS, H. T. 1835. Ex. 3 *D. P. C.* 512—S. P. CURLING *v.* SEDGER, T. T. 1838. C. P. 6 *Scott*, 678; S. C. 4 *Bing. N. S.* 743; S. C. 6 *D. P. C.* 759.

But a summons to tax, even from its return, is no stay of proceedings, consequently an attorney may issue a writ for the amount of his bill.

AFTER action brought on an attorney's bill, a summons was obtained to tax. On a rule nisi, calling on the plaintiff to shew cause why the writ, and subsequent proceedings, should not be set aside, or why the last writ should not be set aside, and why the

* So with respect to the administrator of an attorney (*Questly* v. *Gray*, M. T., 1840, B. C., 9 D. P. C. 154); or an executor (*Jefferson* v. *Warrington*, M. T. 1840, Ex. 7 M. & W. 137).

† Where a bill is taxed after action brought, the Court will refer it to the Master to learn whether the action was brought to avoid taxation. (*Toomer* v. *Fuller*, T. T. 1833, K. B., 2 D. P. C. 195).

plaintiff should not pay the costs, on the ground that the first writ was issued after the summons was returnable, which was contended to be a stay of proceedings.

*Sed per Cur.*—The summons does not operate as a stay of proceedings from its return, so as to prevent the attorney issuing a writ.

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2nd.—Respecting the Action for.

1. *By and against whom to be brought*.*

Arden and Another *v.* Tucker, E. T. 1833. K. B. 4 *B. & Ad.* 815; S. C. 1 *N. & M.* 759; S. C. *M. & Rob.* 191; S. C. 5 *C. & P.* 248.

Although only one of several partners attend to the suit the action should be in the name of the firm, as where one attorney employed one of a firm in the Palace Court.

Action for fees and business done in the Palace Court. It appeared that the plaintiffs were partners as attornies. For the defendant, the roll of attornies of the Palace Court was produced by the prothonotary of that Court, and it was proved that the plaintiff, Richard Edward Arden, was not one of the attornies of that Court. The witness also produced the original warrant to prosecute, filed in the Palace Court, in the action *Tucker* v. *Stevens*, and the bill of costs taxed by the deputy prothonotary, and also the order for taxation, all in the name of Joseph Arden alone. For the defendant it was contended, that there ought to be a nonsuit for misjoinder of plaintiffs. The Chief-Justice said, I cannot distinguish this case from *Brandon* v. *Hubbard*, there is a misjoinder of plaintiffs, and they must be nonsuited. On motion for that purpose—

The Court held, the contract was clearly joint, that the action did lie, and directed a verdict to be entered for the plaintiffs.

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Sprott *v.* Powell, E. T. 1826. C. P. 3 *Bing.* 478.

But an authority to a surveyor, signed by several inhabitants, to indict, does not enable the attorney to sue the inhabitants, he must sue the surveyor.

Several inhabitants of a parish, attending a special vestry, signed resolutions, by which they ordered an indictment brought against the inhabitants, to compel them to repair a road within the parish to be opposed, and that the surveyor of the highways should take the necessary steps for carrying such order into effect: the surveyor having accordingly employed an attorney for that purpose,

Held, that the persons who had signed the resolutions were not personally liable to the attorney for the charges incurred in resisting the indictment, and that the surveyor must be sued alone.

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Milburn *v.* Codd and Another, M. T. 1827. K. B. 1 *M. & R.* 238.

An attorney, who is a member of a joint stock company, and employed by another member who is

The plaintiff and defendants were members of a joint stock company, which being dissolved, and the company being considerably in debt at the time of its dissolution, defendants, as two of the proprietors and two of the committee of management, were sued by several of the creditors of the company. The defendants employed the plaintiff to defend these actions, and a bill of costs was incurred,

* The attorney must look to the party who retains and employs him. (Lord *Tenterden*, C. J.—*Pocock* v. *Russell*, T. T. 1829, N. P., 4 C. & P. 14).

In an action on an attorney's bill, the question to whom credit was given must be decided by the jury. (Lord *Denman*, C. J.—*Hayward* v. *Trott*, 1837, N. P., 8 C. & P. 59). Where a promise has been made by an attorney, his client is liable for costs, even of unnecessary proceedings. (*Patteson*, J.—*Brewster* v. *Meaks*, T. T. 1834, B. C., 2 D. P. C. 612).

sued, cannot recover his costs.

to recover which the present action was brought. For the defendants, it was objected that the plaintiff and the defendants were partners in the transaction out of which this claim arose, and that an action of assumpsit could not be maintained.

*Per Cur.*—The creditors were entitled to be paid by the whole company. If the actions could be defended upon reasonable grounds, they ought to have been defended; but, then, the plaintiff cannot sue those two persons, because all ought to contribute; and he defended for his own benefit. The plaintiff cannot say that there was no defence: he and all the others derived benefit from their defending; and, therefore, he cannot maintain this action.

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RIGLEY *v.* DAYKIN, H. T. 1828. Ex. 2 *Y. & J.* 83.

So, if A. employs B. to raise money, B. goes to C., also an attorney, the loan fails through defect of title—C. cannot sue A. for his costs*.

B., AN attorney, being employed to raise money, applied to plaintiff, another attorney, for that purpose, disclosing his principal, the defendant, and plaintiff agreed to advance it on behalf of one of his clients; but the negociation eventually failed from defect of title.

The Court held, that the plaintiff could not maintain any action for his fees against B.'s employer, on the ground of an usage in the profession for a borrower to pay the expenses of the lender, which was not supported in evidence by shewing that it was usual for the attorney of the lender to send his bills to the attorney of the borrower, who, if it were reasonable, usually recommended his client to pay it. In the ordinary case of an action by an attorney for his bill, the retainer must first be proved.

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HELLINGS *v.* GREGORY, E. T. 1825. C. P. 10 *Moore*, 337; S. C. 1 *C. & P.* 627.

A. and B. retained the plaintiff; A. only undertook to pay; the plaintiff sued both; the jury found for the defendant, and the Court refused a new trial.

IN an action by an attorney against A. and B., father and son, to recover the amount of his bill of costs, it appeared that he was employed by both, in the first instance, but that one only undertook to pay; and the jury having found that the latter alone was liable and given a verdict for the defendants, on motion for a new trial—

*Per Cur.*—There was strong evidence that the son alone gave a separate undertaking to pay the amount of the bill, and it also appeared that the plaintiff refused to undertake the business on the father's account, as he had recently taken the benefit of the Insolvent Act, and that he only consented doing so on the son's saying he would pay him. At all events, whether the undertaking to pay were joint or separate, was a question expressly within the province of the jury to decide; and their verdict appears to be conclusive.

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TABRAM *v.* WARREN, M. T. 1835. Ex. 4 *D. P. C.* 545.

Costs incurred in endeavouring to sell property whilst an in-

ON the question, whether an attorney was entitled to recover from an insolvent costs incurred in endeavouring to sell property of the latter while he is in prison, and taking the benefit of the act, it was contended for the defendant, that an insolvent, after petitioning the Insolvent Court, could not sell or make away with his property with-

* But a creditor who employs an attorney under a commission of bankruptcy is liable to him, though nothing be recovered under it. (Lord *Tenterden*, C. J.—*Pocock* v. *Russen*, T. T. 1829, N. P., M. & M. 357).

out violating the act; and, therefore, the action could not be maintained.

solvent is in prison, and taking the benefit of the act may, if bonâ fide, be recovered.

For the plaintiff, it was argued that all that the act requires is, that the insolvent shall give up his property. It does not necessarily follow that an attempt by an insolvent bonâ fide to sell his property, should operate as a fraud upon the creditors; it may be an advantageous sale, and if the creditors think proper to avail themselves of it, they may do so.

And of that opinion were the Court.

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2. *In what Court to be brought.* See ante, div. III. (*a*).

3rd.—Effect of not being duly qualified.

Meekin *v.* Whalley, T. T. 1834. C. P. 1 *Bing. N. S.* 59; S. C. 4 *M. & Scott,* 494; S. C. 2 *D. P. C.* 823.

An attorney who has not been inrolled or taken out his certificate for the year when the suit was commenced and carried on, cannot recover his costs.

In this action the defendant, shortly after the issuing of mesne process, paid the debt, but refused to pay the costs, on the ground that at the time of the commencement of the action the plaintiff's attorney was not certificated and inrolled. The attorney had taken out a certificate on the 15th January, 1833, but he did not do so again until March, 1834. The writ was sued out on the 6th December, 1833, and the attorney continued the action for his costs, obtained judgment for nominal damages, and issued execution.

*Per Cur.*—The attorney, here, was an uncertificated attorney at the suing out of the writ; his former certificate had expired, and he was not entitled to take the benefit of the statute, as he did not renew his certificate within a month from the 15th November, as required by the statute. So far was he from availing himself of this indulgence, that he did not take out his certificate until the month of March; and the writ was sued out by him on the 6th of the preceding December. This, it cannot be denied, was a fact within his own knowledge. At the commencement of the suit the defendant paid the debt. From the moment of such payment the proceedings were continued for the benefit of the attorney. We cannot, therefore, in putting such construction upon the 37 Geo. 3, as we in the exercise of our discretion must put upon it, allow the costs of the cause to fall on the defendant.

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Newton *v.* Spencer, H. T. 1838. C. P. 6 *D. P. C.* 401; S. C. 4 *Bing. N. S.* 174; S. C. 5 *Scott,* 489.

An attorney, not admitted in the particular Court, cannot recover that part of his claim which accrued before 1 Vict. c. 56.

An action was commenced before the passing of the statute 1 Vict. c. 56, and judgment obtained after by an attorney not admitted in this Court. On the question, whether he was only entitled to recover the costs accruing from the day the statute came into operation, the words of the 4th section being prospective—

*Per Cur.*—The words are, "That any person who shall have been duly admitted an attorney in any one of Her Majesty's Courts of common law at Westminster shall be at liberty to practise in any other of Her Majesty's Courts of law at Westminster, although he may not have been admitted an attorney thereof; and that no person having been duly admitted an attorney or solicitor in any of Her Majesty's Courts of law or equity at Westminster shall be

prevented from recovering the amount of any costs which would otherwise have been due to him by reason of his not being admitted an attorney or solicitor of the Court in which such costs shall have been incurred." It, clearly, was not the intention of the legislature to give to parties, retrospectively, rights from which, by the law, they were expressly excluded; and, therefore, the attorney is only entitled to those costs that accrued since the statute came into operation.

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BOWLER *v.* BROWN, M. T. 1834. K. B. 2 *Ad. & E.* 116; S. C. 4 *N. & M.* 17; S. C. 3 *D. P. C.* 80.

But business done between the time of the former certificate expiring and new one taken out, if a year does not intervene, may be recovered.

IN an action on attorney's bill, it appeared that the plaintiff's certificate for the year 1830 having expired in November, 1831, he had neglected to take out the certificate for the year ending on the 15th November 1832 until the 13th or 14th of that month. This action was brought to recover the amount of a bill for business done, as an attorney, in August, 1832. It was objected, on the part of the defendant, that, as the plaintiff was, at the time of the business done, acting without a certificate, he was not capable of maintaining this action.

*Per Cur.*—We are of opinion that the plaintiff is entitled to recover, as there was no evidence to shew that the plaintiff had wilfully neglected to take out his certificate. The language of the statute is clear, that the neglect to take out his certificate must be wilful. In the absence of any proof of such wilfulness, we think the plaintiff is entitled to recover.

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JONES *v.* JONES, H. T. 1837. Ex. 2 *M. & W.* 323; S. C. 5 *D. P. C.* 474.

So, where an agent's name is indorsed on the proceedings, the country attorney not being on the roll is no ground for disallowing the costs.

ON a rule to set aside an order of taxation, on the ground that the plaintiff's attorney in the country was not an attorney of this Court during the time that the greater part of the business was done, and had not the consent, in writing, of any attorney of this Court to practise in his name, as required by 2 Geo. 2, c. 23, s. 10. It appeared, that the proceedings were carried on by the London agent, his name appeared in the declaration as the attorney on the record, he sued out the writ, and conducted all the London business in the suit.

*Per Cur.*—The statute really does not apply to a country attorney who procures his agent in London to conduct the business of the suit in Court.

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GLYNN *v.* HUTCHINSON, E. T. 1835. K. B. 3 *D. P. C.* 529; S. C. 2 *Ad. & E.* 660.

The want of a certificate does not render an habeas corpus to remove a cause from an inferior Court irregular*.

IN this case, the bail sued out a habeas corpus from the Court of Exchequer to remove the cause in the Palace Court, and the body of the defendant into the Exchequer, in order that the bail might render him. It appeared that the attorney employed had not taken out his certificate. On this objection being made—

*Per Cur.*—Is there any authority for saying that a client shall lose the advantage of proceedings taken in a cause because the

* A mere irregularity with respect to the certificate of an attorney does not affect his clients. (*Littledale*, J.—*Hilleary* v. *Hungate*, M. T. 1834, B. C., 3 D. P. C. 56).

attorney has not obtained his certificate? *Littledale,* J., ruled the contrary in a case of *Hilleary* v. *Hungate,* (3 D. P. C. 56, infra, n.)

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EYRE *v.* SHELLEY, H. T. 1840. Ex. 6 *M. & W.* 269; S. C. 8 *D. P. C.* 185.

To enable an attorney to sue for business done between the 15th November and the first day of Hilary Term, it is not essential that his certificate should be entered pursuant to 37 Geo. 3, c. 90, s. 27.

To an action for work and labour as an attorney, the defendant pleaded that though, during the time when the work was done, the plaintiff was an attorney duly admitted and inrolled, he had not, during any part of that time, obtained or entered the certificate required by law, authorizing him to practise as an attorney during any part of the said time, pursuant to the statute; and the plaintiff, during all that time, wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never had obtained or entered the same, according to the 37 Geo. 3, c. 90, s. 27. On demurrer—

*Per Cur.*—Upon a careful review of the statutes on this subject, which raise a question of some nicety, we think it was not illegal for a certificated attorney to carry on a suit between the 15th November and the 1st day of Hilary Term in any year, without having entered his certifiate, though he would have been liable to a penalty if, after having so carried it on during a part, he did not enter his certificate before the expiration of that interval.

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EYRE *v.* SHELLEY, H. T. 1840. Ex. 6 *M. & W.* 269; S. C. 8 *D. P. C.* 185.

A plea, that an attorney had not, during any part of the time the business was done, obtained or entered his certificate, is bad, on special demurrer, for duplicity; and, in such a plea, the certificate should be described in the words of the statute.

ACTION for work and labour, as an attorney. Plea: That, although, during the time when the work was done, the plaintiff was an attorney duly admitted and inrolled, he had not, during any part of that time, obtained or entered the certificate required by law, authorizing him to practise as an attorney during any part of the said time, pursuant to the statute; and the plaintiff, during all that time, wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never had obtained or entered the same,

*Per Cur.*—The plea would undoubtedly be bad for duplicity, on special demurrer; but it is cured by pleading over. Probably it would have been bad on special demurrer, but on special demurrer only, for describing the certificate not in the terms of the statute, but by words involving its legal effect and consequences.

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## 4th.—PLEADINGS*.

### 1. *Declaration.*

* Under a declaration on an attorney's bill, money lent may be recovered under a count for money lent, though he cannot recover on his bill. (Lord *Tenterden,* C. J.—*Hemming* v. *Wilton,* T. T. 1830, N. P., 4 C. & P. 318; S. C. M. & M. 529). In a declaration in an action by an attorney for fees, if the word materials be omitted, it is no ground of demurrer. (*Williams,* J.—*Fisher* v. *Snow,* M. T. 1834, B. C., 3 D. P. C. 27).

2. *Pleas.*

LANE *v.* GLENNY, T. T. 1837. K. B. 2 *N. & P.* 258; S. C. 7 *Ad. & E.* 83—S. P. ROBINSON *v.* ROLAND, H. T. 1838, B. C. 6 *D. P. C.* 274—S. P. MOORE *v.* DENT, 1835, N. P. 1 *M. & Rob.* 462.

No bill delivered must be specially pleaded.

THIS was an action on an attorney's bill, to which the defendant pleaded only the general issue. An objection was taken to the bill of the business done by the plaintiffs, which had been delivered to the defendant; but there was no mention of the Court in which the business had been done. It was contended, that this objection, if it be one, is not open to the defendant, not having been specially pleaded. It had been decided, by *Parke*, B., in *Moore* v. *Dent*, 1 M. & Rob. 462, that the want of a signed bill cannot be urged as an objection unless it be specially pleaded.

*Sed per Cur.*—It seems to have been decided, that this objection must be specially pleaded; and we are not disposed to disturb those decisions.

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BECK *v.* MORDAUNT, T. T. 1835. C. P. 2 *Bing. N. S.* 140; S. C. 2 *Scott*, 178; S. C. 4 *D. P. C.* 112.

Formerly this was doubted, but such a plea is not a plea to the merits under a Judge's order to plead issuably.

THE defendant pleaded to an action on an attorney's bill among other pleas, that no signed bill had been delivered pursuant to the statute. These pleas not having been signed by counsel, the plaintiff signed judgment. Upon application to *Bosanquet*, J., at Chambers, with an affidavit of merits, the judgment was set aside. Subsequently, the plaintiff applied to *Park*, J., at Chambers, to strike out the second plea, on the ground that it was not a plea to the merits. That learned Judge, upon the authority of *Holmes* v. *Grant*, Hilary Term, 4 Will. 4, made an order to that effect. On motion to rescind *Park*'s, J., order—

The Court refused to interfere, saying, It is perfectly clear that this is not a plea to the merits, and doubted whether it would not be given in evidence under the general issue.

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HILL AND RANDALL *v.* SYDNEY, H. T. 1838. Q. B. 3 *N. & P.* 161; S. C. 7 *Ad. & E.* 956.

In a joint action for agency, business in the Court of Chancery, the non-admission of one of the plaintiffs must be pleaded.

IN an action for business done by two plaintiffs in Chancery, the defendant pleaded the general issue. It was proved that the plaintiffs were the defendant's agents; and the bill in question was for business done in Chancery. The defendant shewed that the plaintiff, R., was not a solicitor in Chancery, and contended that the action was not maintainable.

But the Court held, that such a defence as, that one of the plaintiffs was not admitted, should have been specially pleaded.

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POTTS *v.* SPARROW, E. T. 1835. C. P. 1 *Bing. N. S.* 594; S. C. 6 *C. & P.* 749.

So, under the general issue, it cannot be shewn that the work was done in preparing an illegal agreement*.

THE defendant pleaded, to an action on an attorney's bill, non-assumpsit. The defence was, that the plaintiff could not recover for services rendered in transferring an illegal contract, and in conducting an action on such a contract; and, a rule nisi having been

* But plaintiff may shew a larger sum due than allowed on taxation. (*Beck* v. *Cleaver*, M. T. 1840, B. C., 9 D. P. C. 111.

obtained accordingly, it was contended, that, under the New Rules, this objection ought to have been pleaded specially, and could not be advanced under the general issue.

*Per Cur.*—It is not now competent to a defendant, in an action of assumpsit, to rely on the illegality of the transaction without putting it on record, and that whether the illegality arise on a statute or at common law.

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HILL *v.* ALLEN, H. T. 1837. Ex. 2 *M. & W.* 283; S. C. 5 *D. P. C.* 471.

To an action on an attorney's bill, plea, that no benefit was derived from the business, is bad on demurrer.

IN assumpsit on an attorney's bill, and for money paid to defendant's use, and an account stated, the defendant pleaded, first, That the work was done negligently and carelessly, and was useless; secondly, That it was done under an engagement to indemnify the defendant against all costs and charges, and that these were costs incurred under that engagement. These pleas were especially demurred to, on the ground that they amounted to the general issue.

*Per Cur.*—The present pleas negative the facts out of which the contracts stated in the declaration arise, and therefore amount to the general issue.

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HILL *v.* WEIGHT, H. T. 1838. C. P. 5 *Scott*, 662.

In a declaration for work and labour and materials, as an attorney, if the plea uses the word "monies," that will cover the "materials."

TO a declaration for work and labour, as an attorney and solicitor and agent of and for the defendant, and for fees due in respect thereof, and for materials used in and about the same, the defendant pleaded, that all the monies in the first count mentioned were due from the defendant to the plaintiff in respect of work and labour as an attorney in the superior Courts, and that no signed bill had been delivered pursuant to the statute. It was contended that the plea gave no answer as to the work and labour and materials; it only professes to apply itself to the monies mentioned in the several counts to which it is pleaded.

*Tindal*, C. J.—The monies, in the first count mentioned, means the 100*l.* damages; why are we to limit it to the fees?

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FIELD *v.* BESANT, T. T. 1833. K. B. 2 *N. & M.* 207; S. C. 5 *B. & Ad.* 357.

Plea of set-off of costs; taxation after action brought; one-sixth taken off:—Held, that it did reduce the defendant's amount of set-off*.

AN attorney's bill, set up by him as a defence by way of set-off, was, after action brought against him, referred to be taxed. The amount exceeded the plaintiff's demand; but more than a sixth being taken off, the attorney was ordered to pay the costs of the taxation; these costs, when deducted from his bill, left a balance in favour of the plaintiff.

The Court were of opinion, that the sum found to be due upon the taxation must, under the circumstances, be taken as the sum for which the defendant had a right to plead his set-off, and that

* The undertaking of an attorney to carry on an action is an entire contract; and, therefore, the Statute of Limitations is no bar to his right to recover items in his bill beyond six years. (*Harris* v. *Asbourn*, E. T. 1834, Ex., 2 C. & M. 629; S. C. 4 Tyrw. 445. Abridged, ante).

Costs can only be set-off where recoverable by action, and not by attachment only. (*Field* v. *Bezant*, T. T. 1833, K. B., 5 B. & Ad. 357; S. C. 2 N. & M. 207. Abr. supra and post, tit. *Costs*). Set-off will not be allowed where, in effect, it would try a question of negligence on the part of an attorney. (*Patteson*, J.—*Brazier* v. *Bryant*, T. T. 1834, B. C., 2 D. P. C. 600).

the costs of the taxation could not be deducted. The remedy for them must be obtained by attachment. The amount was not due to the plaintiff at the time of the commencement of the action.

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### 3. *Replication.*

MOORE *v.* BOULCOTT, M. T. 1834. C. P. 1 *Bing. N. S.* 323; 1 *Scott*, 122; S. C. 3 *D. P. C.* 145.

Plea, that the work done, as an attorney, "at law and in equity," and no bill delivered, the replication must be in the disjunctive.

IN an action on an attorney's bill, where the defendant pleads that the action is for business done "at law and in equity," and was commenced before the expiration of one month after the delivery of the bill, a replication, denying, in the words of the plea, that the action is for business done "at law and in equity," was demurred to. After argument—

The Court said:—The defendant, in her plea, states, that the action was brought against her to recover the amount of a certain bill of fees, for the work, labour, &c. of said plaintiff, by him bestowed as attorney and solicitor of and for her the said defendant, at law and in equity; and that plaintiff commenced the action against her before the expiration of a month from the delivery of his said bill. The plaintiff, in our opinion, was bound to purge himself of the objection made; under the statute, he was bound to say that the bill contained no charges for fees, disbursements, &c., either at law or in equity; and it is not because the defendant averred immaterially in the conjunctive, instead of the disjunctive, that he was obliged to follow her in his replication.

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## 5th. EVIDENCE FOR THE PLAINTIFF.

### 1. *Of the Retainer*.*

OWEN *v.* ORD, T. T. 1828. C. P. 3 *C. & P.* 349.

In general, a written retainer ought to be obtained before action brought.

IN an action on an attorney's bill, a difficulty arising in proving a retainer—

Lord *Tenterden*, C. J., said—I think it right to state that every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it; and he ought to do this both for his own sake and for the sake of his client.

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RIGLEY *v.* DAYKIN, H. T. 1828. Ex. 2 *Y. & J.* 83.

At all events, a retainer must be proved.

*Per Hullock*, B.—In the ordinary case of an action by an attorney for his bill, the retainer must first be proved†.

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### 2. *Of the Delivery of the Bill‡.*

* An attorney being a corporator does not entitle him to inspect the corporation books, in order to establish his retainer. (*Littledale*, J.—*Stevens* v. *Mayor of Berwick*, M. T. 1835, B. C., 4 D. P. C. 277).

† Proving facts from which a jury may infer a retainer, suffices.

‡ An admission, by a defendant of the delivery of the bill, to enable him to prove under a commission, does not dispense with the proof in an action. (Lord *Tenterden*, C. J.—*Eicke* v. *Nokes*, H. T. 1829, N. P., M. & M. 303).

### 3. *Of the Business having been done.*

COLLING *v.* TREWEEK, H. T. 1827. K. B. 6 *B. & C.* 394. FYSON *v.* KEMP, T. T. 1833. N. P. 6 *C. & P.* 71.

ACTION on an attorney's bill. The plaintiff had sent a bill, duly signed, to an agent to deliver to the defendant. The agent did so, first keeping a copy of the bill and signature. The defendant had not been served with any notice to produce the original bill, which had been delivered to him before the action was brought; and the plaintiff had no copy, except that which had been so taken and kept by his agent. The defendant's counsel objected to the admissibility of that copy in evidence.

A copy of a bill, which has been delivered duly signed, may be given in evidence without notice to produce the original*.

The Court were of opinion, that a bill delivered by an attorney to his client, in obedience to the statute, was but a notice; that the object of giving it was to afford the client an opportunity of taxing the bill, if he thought proper to do so; that the action was founded upon the assumption that that notice had been properly given; and the action itself was, therefore, sufficient notice that the plaintiff was proceeding on the notice previously given. And that the copy might be received in evidence without notice to produce the original.

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### 6th.—EVIDENCE FOR THE DEFENDANT.

HUMPHREYS *v.* HARVEY, T. T. 1834. C. P. 1 *Bing. N. S.* 62; S. C. 2 *D. P. C.* 827; S. C. 4 *M. & Scott*, 500.

AFTER verdict a rule was obtained, on the ground that plaintiff had signed the roll on which attornies enter their names when they are sworn in Court, and also the parchment instrument by which a Judge authorized his admission; but he had never taken this instrument to the clerk of the warrants, in order to his name being inrolled in that officer's book.

As a defence to the action on the bill, the defendant may shew that the attorney has not been duly inrolled;

*Per Cur.*—That roll is not, strictly speaking, the roll of attornies. The inrolment required by the statute was formerly entered on rolls of parchment, and now in a book, alphabetically, by the clerk of the warrants. If there were not such document to refer to, how could the Court, when called on, strike an attorney off the roll? The objection must prevail.

See *Eyre* v. *Shelley*, ante, 513.

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HILL *v.* FEATHERSTONHAUGH, T. T. 1831. C. P. 7 *Bing.* 569; S. C. 5 *M. & P.* 541.

AN attorney had incurred expenses which were useless for the object in view, although done bonâ fide. On an action brought to recover them—

or, that useless expenses were incurred†,

* Fees for procuring the execution of a bail-bond cannot be recovered unless the bond be produced. (*Swinford* v. *Green*, M. T. 1817, 3 Stark. N. P. C. 135).

† Or, that the business was done by a clerk living at a different place to his master, cannot be received. (*Holroyd*, J.—*Taylor* v. *Glassbrook*, 3 Stark. N. P. C. 75). But an attorney is not to lose the amount of his bill, on account of any error in the execution of his duty, being such an error as a cautious man might fall into; but if the charges contained in his bill are brought upon his client by his inadvertence, he cannot recover them in an action. (*Abbott*, C. J.—*Montriou* v. *Jefferys*, M. T. 1825, N. P., 2 C. & P. 113; S. C., R. & M. 317).

If an attorney who is conducting a cause, do not communicate to his client an offer of compromise made by the other party, but go on with the action to put costs in his own pocket, he cannot, after that, charge his client with the costs incurred; but as it is the duty of an attorney to communicate such an offer to his client, it must be presumed that he did so till the contrary is shewn. (*Patteson*, J. —*Sill* v. *Thomas*, 1839, N. P., 8 C. & P. 762).

though bonâ fide;

The Court held, he was not entitled to recover them from his client.

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ALLISON *v.* RAYNER, M. T. 1827. K. B. 7 *B. & C.* 441; S. C. 1 *M. & Ry.* 241.

or, where particular directions of a statute are to be followed, that he did not inform his client of the risk incurred by not having pursued them;

THE statute 1 Geo. 4, c. 119, s. 11, enacts, that no suit in law be proceeded in further than an arrest on mesne process, by any assignee of an insolvent's estate, without the consent of creditors and approbation of one of the commissioners of the Insolvent Court. In an action brought by an attorney, to recover his bill of costs incurred in an action at the suit of such an assignee—

*Per Cur.*—An attorney, who is employed to conduct business on the part of an assignee, ought faithfully and carefully to discharge his duty. It is a part of that duty, in our opinion, to apprize his client of the risk he runs in commencing and proceeding with actions contrary to the direction of the statute, and of his liability to be called upon to pay the costs of such actions out of his own pocket. The question then is, upon whom the onus of proof rests. The affirmative, certainly, is with the attorney, and therefore, in order to sustain this action, the plaintiff ought to have proved he did all that is required by the statute.

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TABRAM *v.* HORN, M. T. 1827. K. B. 1 *M. & Ry.* 228—S. P. THWAITES *v.* MACKERSON, T. T. 1828. K. B. 3 *C. & P.* 341; S. C. *M. & M.* 197.

or, that there was an understanding, no pay unless his client succeeds.

THE attorney, at the time of the retainer, was informed of the incapacity of the defendant, and was promised payment if the property was recovered; upon which he expressed himself confident of succeeding, and that he would undertake and get it for her; he afterwards, upon finding the difficulty of the case, discontinued the action he had commenced without consulting his client. In an action brought by him for the payment of the bills, the jury found for the defendant.

The Court thought the verdict was right; the evidence appeared to them sufficient to warrant the jury in believing that the contract was "No cure no pay." And, on the ground of negligence, they were of opinion, that it was the duty of the plaintiff, under the circumstances of this case, to have made proper inquiry before he took any proceeding; and that the mere sending to the tenant in possession was no inquiry at all.

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CLIFFE *v.* PROSSER, E. T. 1833. Ex. 2 *D. P. C.* 21.

But the disallowance of costs occasioned by gross ignorance of the law, does not deprive the attorney from bringing an action for them*.

IN this case, there appeared to be negligence and ignorance of law on the part of an attorney, which created unnecessary costs; those costs being disallowed on taxation, the case came before the Court, who said—

There were authorities to shew that ignorance of the law is crassa negligentia; and they made the rule absolute for striking out the items objected to, but without prejudice to the right of the plaintiff to bring an action to recover them.

* And where the defence to an action on an attorney's bill was negligence, the Court ordered a copy of a case, and opinion thereon, at the defendant's expense. (*Evans* v. *Delegal*, M. T. 1835, Ex., 4 D. P. C. 374).

HOWARD *v.* BARTOLOZZI, H. T. 1833. K. B. 4 *B. & Ad.* 555.

THE plaintiff, an attorney, sued for money lent, &c. It appeared that he had been employed by a party about to take the benefit of the Insolvent Act to prepare a list of debts, which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge.

So, an attorney, employed to prepare a schedule for the Insolvent Court, does not, by omitting his own debt, commit such a fraud on the creditors as to bar his action.

At the trial, *Littledale*, J., was of opinion that the omission, by plaintiff, to insert his debt, was not any fraud upon the Insolvent Act or the general body of creditors; and, assuming it to be a fraud on the defendant, it would give her a good ground of action against the plaintiff, but was no answer to this action. A verdict was entered for plaintiff, with leave to move. On motion for a nonsuit to be entered—

*Denman*, C. J., and *Park*, J., held, that this was not such a fraud upon the general policy of the Insolvent Act as would bar the action, but said—As the jury have found, in effect, that the plaintiff was guilty of fraudulent conduct in wilfully concealing his debt, and preventing its being inserted in the Schedule, we think that finding was not warranted by the evidence, and that, upon this ground, there should be a new trial.

On the second trial, the jury arrived at the same conclusion, and found for the defendant.

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TABRAM *v.* FREEMAN, H. T. 1834. Ex. 2 *C. & M.* 451; S. C. 4 *Tyrw.* 180.

UPON an agreement by an insolvent about to take the benefit of the act, with his creditor, that the claim of the latter should be omitted in the schedule, and that a cognovit which he held should be suspended, and revived after the debtor's discharge—

But that law has been doubted.

The Court held it to be fraudulent; and the cognovit and judgment signed, and execution issued thereupon after the discharge, were set aside with costs; and observed, that the intent of the statute was, that insolvents should lay before their creditors and the Court a fair and true statement of their affairs; that, where they have been guilty of no misconduct, their persons should be discharged and their property divided among their creditors; and that, when discharged, they should be unincumbered with prior obligations, and free to seek their livelihood, subject to the right of the creditors to their future surplus property. All these objects might be defeated if agreements like the present could be supported in law.

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### 7th.—WITNESSES.

WILLIAMS *v.* GOODWIN, E. T. 1826. C. P. 11 *Moore*, 342; S. C. 2 *C. & P.* 257.

IN an action on an attorney's bill, it appeared that the costs in question were incurred in the carrying on of an action, brought by the son of the defendant, for a malicious prosecution, that the plaintiff was employed by the present defendant to conduct that suit, and that, on the trial of that cause, the defendant was called as a witness on behalf of his son; upon which occasion the plaintiff in this action (the attorney) prepared a release of the father, (the pre-

In an action on an attorney's bill, if the witness called be one to impose on the Court, plaintiff will be nonsuited.

sent defendant), in case his competency should be questioned. *Best*, C. J., thought that the plaintiff, having imposed upon the Court, was not entitled to recover, and he therefore directed a nonsuit. On motion to set it aside—

The Court entertained the same opinion.

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8th.—Staying Proceedings, and summary Interference.

Smith *v.* Rolt, E. T. 1833. Ex. 2 *D. P. C.* 62.

The Court will not stay proceedings in an action for costs, on the ground that a verdict had been obtained against him for negligence in the same action*.

An action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that the attorney had been guilty of gross negligence; and the attorney having brought an action for his bill of costs; on motion to stay the proceedings—

*Per Cur.*—We cannot interfere summarily. Negligence will be a defence in this action. The second verdict appears to be inconsistent with the first. How can it be said that one of two inconsistent verdicts is better than another? If the judgment in that action is an answer to the present one, the defendant can plead it.

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9th.—Sum recoverable.

Shaw *v.* Arden, M. T. 1832. C. P. 1 *D. P. C.* 705; S. C. 9 *Bing.* 287; S. C. 2 *M. & Scott*, 341.

Whether an item for charges in an inferior Court, under a plea of set-off, be useless, is subject to revision by the jury†.

To an action against defendants, as attornies, they pleaded a set-off for business done for the plaintiff in the Palace Court. The defendants were employed by the plaintiff to sue in the Palace Court a person named C., and his son, upon a joint and several promissory note. Two actions were commenced upon it. When the causes were so far advanced as to entitle the plaintiff to sign judgment, terms of compromise were offered by the elder defendant. Proceedings were accordingly stayed upon certain conditions. The plaintiff afterwards wrote to his attornies, desiring them to proceed in the actions, as C. had not fulfilled his promise. Judgment was accordingly signed and execution issued against the C.'s, who obtained a rule to set aside the judgment, on the ground of its having been signed against good faith. Cause was shewn against the rule, but it was made absolute, with costs. The costs paid by the defendants to C.'s attorney, the plaintiff's costs in shewing cause, and the costs of signing judgment, formed the defendant's set-off to the present action. *Tindal*, C. J., who tried the cause, directed the attention of the jury to the question of whether the defendants

* The Court refused summary interference where it was denied that there had been an agreement to pay only taxed costs, and the plaintiff had recovered a verdict and costs. (*Hodson* v. *Terrall*, M. T. 1833, Ex., 2 D. P. C. 264).

† Where a solicitor conducts a cause formâ pauperis, he can only recover of him the costs out of pocket. (*Per Abbott*, C. J.—*Philipe* v. *Baker*, M. T. 1824, N. P., 1 C. & P. 533). In an action by an attorney on a promissory note and a bill of costs, the amount of the note and costs did not tally; no evidence of consideration was given:—Held, that was for the jury to say, whether the note was given in payment of the costs. (Lord *Tenterden*, C. J.—*King* v. *Masters*, T. T. 1828, N. P., 3 C. & P. 347)

had exercised a proper discretion, with a view to the interest of their client, in signing and endeavouring to support the judgment, or whether they had taken those procedings unnecessarily and improperly. On the case coming before the Court—

They concurred with the Chief-Justice.

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BERRINGTON *v.* PHILLIPS, H. T. 1836. Ex. 1 *M. & W.* 48.

After action brought on an attorney's bill, and notice to claim interest, under 3 & 4 Will. 4, c. 42, given, the bill was referred to taxation under the common order:—Held, that interest could not be allowed.

A SIGNED bill was delivered on the 1st November, 1833; and in December the plaintiffs made a demand of interest thereon, in writing, according to the 3 & 4 Will. 4, c. 42, s. 28. In June 1834, a writ of summons was sued out, and a bill, at the instance of the defendant, was referred, on the usual order, to be taxed by the Master, who refused to allow the interest. A Judge at Chambers declined to order it to be allowed, on the ground that that must be done by the jury.

*Sed per Cur.*—The condition to be allowed; interest not having been incorporated in the order, we cannot alter the terms of it.

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WALLER *v.* LACY, E. T. 1840. C. P. 8 *D. P. C.* 563.

Where an attorney cannot recover part of the items taxable, under 2 Geo. 2, no bill being delivered, he may recover those not taxable.

DECLARATION for work done, as an attorney and solicitor. Plea, no signed bill delivered. The plaintiff claimed by his bill two items which were of a taxable nature; and five which could not be made the subject of taxation. It also appeared that no bill had been delivered with respect to the taxable items, in pursuance of the 2 Geo. 2, c. 23. It was contended, that although the plaintiff could not recover a particular item because the requisites of the 2 Geo. 2, had not been complied with, still he might nevertheless recover the residue of the bill. *Drew* v. *Clifford,* Ry. & Moody, 280.

And of that opinion were the Court.

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(*d*) TO CONTINUE ORIGINAL ACTION, AFTER PAYMENT OF DEBT COLLUSIVELY TO CREDITOR*.

NELSON *v.* WILSON, E. T. 1830. C. P. 6 *Bing.* 568; S. C. 4 *M. & P.* 385.

To constitute a collusive settlement, so as to enable the attorney to proceed in the action, he must make out a clear case; grounds of suspicion will not do.

THIS was an action of assumpsit. The cause having been settled by the parties in the absence of the plaintiff's attorney, which the latter conceiving to have been collusively done with intent to deprive him of his claim on the defendant for costs, in the event of a verdict against him, carried down the record to the assizes, and obtained a nominal verdict, notwithstanding a notice he had received from the defendant's attorney that the cause had been settled, and that a motion would be made to set aside the verdict in case he should proceed.

*Per Cur.*—Primâ facie, the parties to the cause have an undoubted right to settle it, without the intervention of their attornies. If the plaintiff's attorney thinks proper to go on after a settlement,

* Where parties settle a cause without the intervention of the attorney, that settlement is no answer to an application against the attorney to deliver up the record to the opposite party when successful. (*Williams,* J.—*Baber* v. *Harris,* E. T. 1839, B. C., 7 D. P. C. 589).

for the purpose of obtaining his costs, he is bound to make out a clear case of collusion, suspicion will not do.

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*Ex parte* HART, E. T. 1830. K. B. 1 *B. & Ad.* 660; S. C. 1 *D. P. C.* 324.

And where a cause is a question of mere damage, a settlement between the parties will not be deemed collusive.

AFTER plea pleaded, the plaintiff's attorney gave notice to the defendant's not to settle the action, without his (the attorney's) consent. The plaintiff, however, was induced by the defendants, for certain considerations, to give them a general release, which they pleaded puis darrein continuance. A rule was obtained, calling on the defendants to shew cause why they should not pay the plaintiff's costs to Hart, his attorney, on the ground that the defendants had no right, by compromising the action, to deprive the plaintiff's attorney of his lien for costs.

*Per Cur.*—This case is distinguishable from those in which the amount of damages is ascertained. Here they are unliquidated. This rule must be discharged.

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MORRISON *v.* SUMMERS, E. T. 1830. K. B. 1 *B. & Ad.* 559; S. C. 1 *D. P. C.* 325.

So, where the payment was to the client against good faith, the Court stayed the proceedings on payment of the costs of the attorney's letter previous to suing, and costs of the application.

AFTER an application for payment by the attorney, and promise to pay on a certain day, and before that day a writ actually sued out, the party paid the amount to the plaintiff, without any communication with the attorney, and the attorney having issued the writ—

*Per* Lord *Tenterden*, C. J.—I have no hesitation in saying, that, if, in answer to an application by a creditor's attorney for payment, the debtor applies for time, and receives the indulgence he desires, he ought to pay the attorney's charge for the application, and for the attendances which have been rendered necessary by his own request. I learn from a Master, that in case of a writ being sued out after an application for payment, the plaintiff is allowed the costs of that application, and I think very properly. The present rule, therefore, shall be made absolute on condition of payment of the 13*s.* 4*d.* originally demanded, and which has been the cause of this dispute, and also the costs of the present application.

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ROOKE *v.* WASP, M. T. 1828. C. P. 5 *Bing.* 190.

In another case, where a defendant was arrested after payment of the debt to the client, who made no mention of costs, and the attorney proceeded in the action, the Court stayed the proceedings without costs.

THE plaintiff's attorney having applied by letter to the defendant for the payment of a debt; the latter, four days afterwards, paid the amount to the plaintiff, not knowing that a writ had been previously sued out against him. The plaintiff's attorney afterwards caused the defendant to be arrested on a writ sued out before the payment was made to the plaintiff. On motion to stay the proceedings—

The Court, thinking that the plaintiff's attornies had been guilty of sharp practice, ordered the rule to stay proceedings to be made absolute without costs.

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GOULD *v.* DAVIS, E. T. 1831. Ex. 1 *C. & J.* 415; S. C. 1 *Tyrw.* 380; S. C. 1 *D. P. C.* 288.

On a collusive

THE defendant, knowing of the plaintiff's insolvent state, had

procured a discharge from the plaintiff, of the debt and costs, by a bill, to be deposited in the hands of a third person. On a rule to shew cause why it should not be delivered up to the plaintiff's attorney—

*Per Cur.*—The plaintiff and defendant settle the debt between themselves, the defendant being well aware of the claim of the attorney, and that the plaintiff was unable to pay the costs. The plaintiff has only a right to recover his debt, he has no right to get into his hands the costs which should come into the hands of the attorney. The defendant, by giving this security, lent himself to the plaintiff, and the plaintiff being a beggar, in what a situation would the attorney be placed by the arrangement between these parties if the Court were not to interfere in the manner prayed for by this rule?

settlement* where one party was insolvent, and he received security for the debt, and the attorney's costs also: —Ordered summarily to give up the security to the attorney.

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YOUNG *v.* REDHEAD, T. T. 1833. Ex. 2 *D. P. C.* 119.

A PLAINTIFF was nonsuited, and a rule nisi was afterwards granted to set aside the nonsuit, on payment of costs, and then the parties entered into an arrangement, without the intervention of the defendant's attorney, to settle the action by the defendant's giving a bill of sale and warrant of attorney to the plaintiff for his debt and costs, but without providing for the costs due by the defendant to his attorney, and the attorney thereupon got the rule discharged for setting aside the nonsuit.

*Per Cur.*—Fraud or no fraud has always been the question, and unless it clearly appears that there was fraud in the contemplation of the parties, and an intention to cheat the attorney of his costs, he has no right to interfere with the arrangements of the parties themselves. But, in this case, we think the attorney was justified in getting the rule discharged.

So, parties cannot settle so as to deprive the attorney of his costs. If they do, the attorney may get a rule as to nonsuit set aside, so as to leave the case open.

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CHAUVEL *v.* CHIMELLI, E. T. 1833. K. B. 4 *B. & Ad.* 590; S. C. 1 *N. & M.* 731.

THE plaintiff's attornies gave the defendant's attornies an undertaking to pay the costs, in the event of the defendant's obtaining a verdict. The defendant obtained a verdict, and died, and judgment was entered up within two terms. On motion to shew cause why the plaintiff's attornies should not pay to the attornies of the defendant 119*l.*, the taxed costs in the cause, pursuant to their undertaking, they refused to do, unless a scire facias were sued out by the defendant's representatives as an authority to them to pay the money.

*Per Cur.*—No scire facias was necessary.

So, an attorney having an undertaking, and also a lien for his costs, may, on the death of his client, after verdict, enter up judgment in two terms in the name of the deceased, so as to enforce his demand on the undertaking, without any sci. fa.

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ABBOTT *v.* RICE, T. T. 1825. C. P. 2 *Bing.* 132; S. C. 10 *Moore*, 489.

THE attorney for a second mortgagee induced the tenant to dis-

After entry of

* An attorney has no right to go on for costs where parties settle between themselves, unless it appears affirmatively to have been done to deprive him of his costs. (*Jordan* v. *Hunt*, E. T. 1835, Ex., 3 D. P. C. 666). Where, after writ issued, an attorney's clerk received the debt, the Court stayed proceedings on payment of the costs of the writ. (*Wyllie* v. *Phillips*, E. T. 1837, C. P., 5 D. P. C. 644).

satisfaction on the roll, the Court will not vacate such entry on the ground of a collusive settlement as to costs.

pute the title of his immediate landlord, a prior mortgagee by replevying, and commenced an action of replevin without the express authority of the tenant, the latter being ignorant of the nature of the replevin bond; but, on discovering it, caused satisfaction to be entered on the roll.

*Per Cur.*—If an attorney will use the name of a tenant against his landlord, such attorney must be prepared to shew that the tenant knew distinctly what he was doing: if not, it is but fair to presume that he was acting improperly. Here the attorney should have required a proper indemnity to have been given to him by the plaintiff, to guard him against the consequences which might have followed by depriving him of costs, as well as an undertaking by him not to release the action; and, if a party were afterwards to be guilty of a breach of either of these contracts, the Court would be enabled to teach him; if not, they cannot interfere.

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MEEKIN *v.* WHALLEY, T. T. 1834. C. P. 1 *Bing. N. S.* 59; S. C. 4 *M. & Scott*, 494; S. C. 2 *D. P. C.* 823.

But, where an uncertificated attorney continued an action after payment of the debt to his client, the Court stayed the proceedings after execution issued.

AFTER judgment and execution issued. On motion to stay the execution, it appeared that the defendant paid the debt after process had been served upon him, to the plaintiff, but refused to pay the costs, on the ground, as he alleged, that the person who acted as the plaintiff's attorney was not an attorney of this Court.

*Per Cur.*—At the time of suing out the writ, the gentleman who acted as attorney for the plaintiff was not, in fact, an attorney of either of the Courts. This was a fact that must have been within his own knowledge. We shall be well warranted, upon the construction of the 37 Geo. 3, c. 90, s. 31, in the exercise of our discretion, in refusing to permit the costs of the cause to fall upon the defendant, seeing that the plaintiff never could be liable for them. —*Rule absolute.*

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### (*e*) TO REFUSE TO GO ON WITHOUT FUNDS.

HARRIS *v.* OSBOURN, E. T. 1834. Ex. 2 *C. & M.* 629; S. C. 4 *Tyrw.* 445.

The undertaking of an attorney to carry on an action is an entire contract, and cannot be determined without notice,

ACTION by an executor for an attorney's bills. Pleas, general issue, and the Statute of Limitations. It appeared that the business charged for in the particulars of demand was done by the testator for the defendant; and the items were for charges, in respect of one and the same cause, which was in progress for more than six years.

*Per Cur.*—The contract between attorney and client is to be treated as a general contract, or as a special contract to carry on the suit to a termination subject to be defeated on reasonable notice. On looking at the authorities, we find that, in ancient times, this was considered an entire contract, of which the attorney could not divest himself by any means; but, in consequence of the increased expenses of suits in modern times the rule has been varied, and the attorney is at liberty to determine the contract on reasonable notice. The contract of the client is to pay at the completion of the suit; and, unless the contract be defeated by reasonable notice, the attorney, before that time, has no cause of action, and the Statute of Limitations is no defence.

HOBY *v.* BUILT, H. T. 1832. K. B. 3 *B. & A.* 350.

AN attorney, on the commission-day of the assizes, said, that he should not deliver briefs till the plaintiff gave him money to fee counsel. In an action against the attorney for negligence, the jury found, that, under the circumstances, the notice had not been reasonable, so as to have afforded the client time to provide the money.

which must be a reasonable notice.

The Court held, that although an attorney is not bound to go on with a suit, if his client refuse to furnish funds, yet he is bound to give him reasonable notice, and refused to disturb a verdict for the plaintiff.

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ROWSON *v.* EARLE, T. T. 1829. N. P. *M. & Malk.* 538.

THE plaintiff, an attorney, conducted a Chancery suit for two years, until a decree was made, and the Master had made his report, and then gave notice of giving up the papers for want of funds, and actually did give them up for that reason.

And after such notice, may refuse to go on for want of money,

*Per* Lord *Tenterden*, C. J.—It cannot be supposed that any attorney will carry on a cause of an indefinite length unless he is furnished with funds so to do, and he had a right undoubtedly to say he would not go on, unless he was furnished with the means so to do.

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WADSWORTH *v.* MARSHALL, T. T. 1832. Ex. 2 *Cr. & J.* 665.

AFTER an attorney had proceeded in a cause, and gone as far as giving notice of trial, he was led to suppose, from inquiries he had made, that the plaintiff was in insolvent circumstances; that he had received notice from the defendants of their intention to dispute the bankruptcy, which would render further evidence necessary on the part of the plaintiff, and increase the expense of going to trial; and that he had, in consequence, required a further advance of money for that purpose, which he had not received, by reason whereof he had countermanded the notice of trial.

from time to time; but not for his costs, but the expenses out of pocket.

*Per Cur.*—We think an attorney is entitled to such money as he must actually want from time to time. But that cannot be extended to his own charges.

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VANSANDAU *v.* BROWNE, M. T. 1832. C. P. 1 *D. P. C.* 715; S. C. 9 *Bing.* 402; S. C. 2 *M. & Scott*, 543.

AN attorney, who had given notice that he could not continue a cause unless furnished with the necessary funds, abandoned the cause before its termination, and brought this action for the fees, and for the time he was engaged in the cause.

And after such notice he may recover for the time he was employed.*

*Per Cur.*—That an attorney cannot sue for his bill till the business which he has been retained in is terminated; it would be long before we should be induced to assent to such a proposition. Suppose the employer to become insolvent while the attorney is engaged in a long and difficult case, it would be hard if he could not recede. It is not to be supposed that an attorney may suddenly give up his employment, because a client does not upon every occasion yield to

* So he may recover under the same circumstances where he discovers he cannot succeed. (*Tindal*, C. J.—*Lawrence* v. *Potts*, E. T. 1834, N. P., 6 C. & P. 428).

his demand for money; but, an attorney who has given notice that he would not go on with a cause without being supplied with money, has a right to desist from it, and might recover for the work done up to that time.

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### (*f*) To use securities in his hands.

KITE *v.* MILMAN, H. T. 1833. C. P. 2 *M. & Scott*, 616.

Where an attorney, in pursuance of his undertaking, has been compelled to satisfy a judgment, the Court will not allow him to have the benefit of the execution.

ACTIONS had been brought by the plaintiff against the defendant, to recover damages for defamation, and for false imprisonment. The defendant's attornies, by his direction, and acting upon the advice of his counsel, suffered judgment to go by default in both actions, and upon the execution of writs of inquiry thereon the defendant's attornies, (on whose behalf the present application was made), at the request of the defendant, instructed counsel to apologize on his part, and to consent to a verdict being entered for the plaintiff in each action, in the one for 50*l.*, and in the other for 10*l.*, and conversations took place, which, in fact, amounted to an undertaking on the part of the defendant's attornies. The defendant, however, was taken in execution; the attornies ultimately having to pay the amount, obtained a rule to shew cause why, on paying the money, they should not have the benefit of the executions under which the defendant was in custody.

*Sed per Cur.*—This is a case of gross fraud against the defendant's attornies, but the payment of the damages and costs will necessarily operate in discharge of the executions, and we have no power to detain the defendant in custody.

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### (*g*) Effect of being a prisoner*.

### (*h*) Respecting the lien of.

#### 1. *In what cases it attaches.*

PRATT *v.* VIZARD, M. T. 1833. K. B. 2 *N. & M.* 455; S. C. 5 *B. & Ad.* 808.

To constitute a lien there must be a privity between the parties.

THE question in this case was, whether A., the attorney of B., an intended mortgagee, had a lien as against C., the intended mortgagor, for the costs of preparing the deeds upon deeds delivered by C. to B., and by the latter handed over to A., for the purpose of investigating C.'s title.

The Court held, the attorney had no lien, as it was perfectly clear that there was no privity of contract, which is essential to constitute the right of lien.

* By 1 & 2 Geo. 2, c. 13, no attorney, a prisoner, can commence or prosecute any action; but he may continue actions commenced before his imprisonment. An attorney who becomes a prisoner after action commenced, may recover his fees, his client having had constant communication with him. (Lord *Denman*, C. J.—*Noel* v. *Hart*, M. T. 1837, N. P., 8 C. & P. 230).

LATHAM *v.* HIDE, M. T. 1832. Ex. 1 *D. P. C.* 594; S. C. 1 *C. & M.* 128; S. C. 3 *Tyrw.* 143.

AN attorney of King's Bench conducted an action in Exchequer in his own name, brought an action for his fees, and claimed a lien.

*Per Cur.*—The statute 22 Geo. 2, having prohibited an attorney from acting, except in the Court in which he is an attorney, with this single exception, that he may, with the consent of an attorney of another Court, (such consent being in writing, to be signed by such attorney), and in the name of such attorney, sue and defend, &c, it seems to us that no action can be maintained by him for his fees in conducting an action in disobedience to the provisions of the statute. It follows that he can have no lien for such fees.

And the business must be done in the Court in which the attorney is admitted.

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*In re* SHARPE, T. T. 1832. K. B. 1 *D. P. C.* 432.

TROVER against an attorney for deeds, cause referred, award a nonsuit and each party to pay his own costs. The attorney claimed lien on the deeds for the costs.

*Taunton*, J.—I am of opinion that the attorney has no lien for the sum in question. As to the costs of the reference, that matter was in the discretion of the arbitrator, and he has disposed of it.

In trover against an attorney for deeds, on reference to arbitration he has no lien for the costs of the reference*.

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BRIDGES *v.* SMYTH, M. T. 1831. C. P. 1 *D. P. C.* 242; S. C. 8 *Bing.* 29; S. C. 1 *M. & Scott*, 93—S. P. POCOCK *v.* SHAUGHNESSY, E. T. 1837, K. B. 6 *A. & E.* 807.

ON motion to allow the set-off of a judgment of the intestate in this Court against a judgment of the defendant to a larger amount in the Court of King's Bench.

The Court held, 1st, That the judgment for the plaintiff in this Court might be set off against the judgment for the plaintiff in the Court of King's Bench, although the plaintiff's attorney had administered to his effects as a judgment-creditor, and sued out a writ of elegit against the defendant, and commenced ejectments to enforce it; and, 2nd, That the attorney had no lien for his costs upon the judgments in this Court; and he having refused to allow them to be set off against the judgment in the King's Bench, the Court ordered him to pay the costs of the application.

Plaintiff obtained judgment in Common Pleas against defendant, who obtained judgment in King's Bench against plaintiff:—Held, that there might be a set-off without reference to the attorney's lien.

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SYMONS *v.* BLAKE, T. T. 1835. Ex. 2 *C., M., & R.* 416; S. C. 4 *D. P. C.* 263.

IN this case the Court said, an attorney is in no better situation than his client would be. The lien of the attorney depends on the right of the client to judgment. Where the client is entitled to it, as against the opposite party, the Court permits the attorney to carry on the suit for his own benefit, even where the client declines to do so himself. But where there is no collusion, and the client, either by his own act, or by the act of the law, is deprived of the

So, a defendant, who is entitled as against the plaintiff to be relieved from the verdict against him, cannot be pre-

* In trover, after verdict by consent, on delivering up the goods, &c., and before doing so plaintiff became insolvent, but the defendant before notice delivered them over:—Held, that the plaintiff's attorney had no lien for his costs. (*Bloomfield* v. *Blake*, M. T. 1833, Ex., 2 D. P. C. 272). But, one judgment cannot be set off against another, without paying the attorney's costs, he having a lien. (*Patteson* J.—*Domett* v. *Helyer*, T. T. 1834, B. C., 2 D. P. C. 540).

judiced by the attorney's lien.

means of further enforcing his claim against the opposite party, the lien of the attorney is altogether at an end.

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HALLIDAY *v.* LAWES, E. T. 1837. C. P. 4 *Scott,* 475.

An attorney's lien does not prevent a set-off of interlocutory costs, under rule H. T. 2 Will. 4, against final costs.

THE 93rd Rule of Hilary Term, 2 Will. 4, which provides that, "no set-off of damages, or costs, between parties, shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted." On the question whether interlocutory costs may, under the 93rd Rule of Hilary Term, 2 Will. 4, be set off against the final costs of the cause, without regard to the attorney's lien—

*Per Cur.*—The rule does, in terms, admit of the set-off of interlocutory costs against the final costs in the cause: the attorney's lien attaches only on the balance.

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2. *Against whom he has a Lien.*

ESDAILE *v.* OXENHAM, T. T. 1824. K. B. 3 *B. & C.* 225; S. C. 5 *D. & R.* 49.

The attorney of the vendor has no lien against the vendee on deeds deposited with him by the latter, the contract having been rescinded.

THE vendee's attorney sent the deeds of conveyance to B., the vendor, to be executed, who returned them to the defendant, his attorney executed without any direction. Some necessary parties having refused to execute, the contract was rescinded. In trover, by the vendee, for deeds and stamped pieces of parchment,

It was holden, that the purchaser was entitled to recover the deeds from the defendant, the vendor's attorney, without being subject to the lien, which he had against the vendor.

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LIGHTFOOT *v.* KEANE, T. T. 1836. Ex. 1 *M. & W.* 745; S. C. 1 *Tyrw. & G.* 1004.

So, an attorney's lien against trustees does not extend to a devisee, who becomes afterwards entitled

A. DEVISED certain estates to trustees in trust, to pay a part of the rents and profits to his widow, and the residue towards the maintenance and education of his son, until he reached twenty-one, and after that time to him, during the lifetime of the widow, and, upon her death, he devised the estates to his son in fee. The trustees having incurred certain costs and expenses with the plaintiff, an attorney, in carrying into effect the trusts of the devise, deposited the title-deeds with him as a security. In detinue for the deeds, by the devisee, the defendant, the attorney, claimed a lien.

*Per Cur.*—This is the personal debt of the trustees. Could they mortgage the estate? Then how can they make a deposit of the title-deeds, which is an equitable mortgage? There is no lien at all. Judgment must be for the plaintiff.

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REX *v.* SANKEY, T. T. 1836. K. B. 5 *A. & E.* 423; S. C. 6 *N. & M.* 839.

But an attorney who is town-clerk, has a lien

ON a rule calling on the late town-clerk to deliver over to the present town-clerk all books, books of account, bills, securities, records, muniments, and papers, &c. of and belonging to the cor-

poration of L. He refused to give up certain documents, upon which he had a lien for business done by him as solicitor to the corporation.

*Per Cur.*—The town-clerk to a corporation, who is also their solicitor, is entitled to a lien for business done by him as solicitor.

against the corporation.

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JONES *v.* TURNBULL, E. T. 1837. Ex. 5 *D. P. C.* 591.

THE plaintiff, a builder, and an uncertificated bankrupt, sued for a balance due to him for repairs, and was nonsuited. The cause was referred, and the arbitrator found a sum to be due to the plaintiff. The plaintiff's attorney claimed, as against the assignees, a lien on the award for the costs of the action, and of the award.

*Per Cur.*—We think the attorney entitled to his lien on the award for his costs, and the residue belongs to the assignees.

An attorney has a lien against the assignees of an uncertificated bankrupt for business done for the latter.

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### 3.—*Upon what he has a Lien.*

*Ex parte* HORSFALL, M. T. 1827. K. B. 7 *B. & C.* 528; S. C. 1 *M. & Ry.* 306.

THE question in this case was, whether an attorney, whose client had obtained an order for the delivering up of his deeds and papers, was entitled to retain the drafts of deeds which he, the attorney, had prepared and been paid for.

*Per Cur.*—Where the attorney has been paid his bill, he is bound, if the client requires it, to deliver up all drafts and copies of deeds, or other documents in his hands.

An attorney, after his bill has been paid, has no lien even on the drafts.

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### 4.—*To what extent*.*

STEPHENS *v.* WESTON, M. T. 1824. K. B. 3 *B. & C.* 535; S. C. 9 *D. & R.* 395.

THERE had been several actions between the same parties, arising out of the same grievance. The plaintiff had succeeded in three of them, and the principal defendant in one of them. A motion was made to the Court, that the judgment and costs in this action, subject to the lien of the attorney, might be set off against the judgment and costs in the action in which that defendant had succeeded. The attorney claimed a lien on the judgment and costs in this, (being the last action in which the plaintiff succeeded), for all his extra costs in all the actions.

The Court held, that an attorney's lien against his client is general; but where other parties are concerned, it is particular, and must be regulated by the rights of others.

An attorney's lien against his client is general, but, as against the rights of others, particular.

* Deeds coming into an attorney's possession, as a commissioner for taking acknowledgments under the 3 & 4 Will. 4, c. 74, gives him a lien for his own fees, but not for those of his joint commissioners, unless a joint authority be shewn. (*Ex parte Grove*, M. T. 1836, C. P., 5 D. P. C. 355). The agent of an attorney has only a lien to the extent of each particular case. (*Littledale*, J.—*Dicas* v. *Stockley*, T. T. 1836, N. P., 7 C. & P. 537).

WATSON *v.* MASKALL, T. T. 1835. C. P. 1 *Bing. N. S.* 366; S. C. 5 *M. & Scott*, 286; S. C. 3 *D. P. C.* 638.

Under Rule, H. T. 2 Will. 4, an attorney has a lien only to the costs of the particular suit, and which are to be taxed as between attorney and client.

THERE had been cross actions between these parties, in which each had obtained a judgment, and one being set off against the other, subject to the lien of the party's attorney in the particular cause, it became a question how the costs should be taxed and to what extent the lien should be allowed; whether as between attorney and client, or merely as between party and party.

The Court held, that, in allowing the set-off upon judgments recovered by contending parties, the costs for which the attorney has a lien, by the 93rd rule of Hilary Term, 2 Will. 4, are to be taxed as between attorney and client, not as between party and party.

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OGLE *v.* STORY, E. T. 1833. K. B. 1 *N. & M.* 474.

In cases of mortgage, an attorney's lien is co-extensive with the interest of his client.

THE attorney of the mortgagee having possession of the title-deeds—

Held, to have a lien thereon, for his demand against his client, to the extent of the interest of his client in the deeds.

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5.—*When merged.*

HIGGINS *v.* SCOTT, E. T. 1331. K. B. 2 *B. & Ad.* 413.

Although an attorney's claim to costs be barred by the Statute of Limitations, it does not divest him of his lien.

AN attorney having obtained a judgment for his client, the defendant afterwards was discharged under the Insolvent Act, and neither the plaintiff nor the attorney took any step for more than six years, either as to debt or costs; but a fi. fa. afterwards issued against the defendant's goods.

The Court held, that although the attorney's remedy for his bill was barred by the statute, yet that the debt was not, and, having a lien on the execution, he was entitled to be paid the amount of his bill of costs out of the proceeds; the statute bars the remedy only.

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COWELL *v.* BETTELEY, H. T. 1834. C. P. 10 *Bing.* 432; S. C. 4 *M. & Scott*, 265; S. C. 2 *D. P. C.* 780.

An award cannot deprive an attorney of his lien for costs.

A. WAS plaintiff in two actions, which, by an order of Nisi Prius, were, with all matters in dispute, referred to arbitration, the costs to abide the event. The arbitrator directed a verdict to be entered for the plaintiff, with damages, in the first action, and for the defendant in the second. He also found a debt due to the defendant from the plaintiff upon other matters in dispute, and ordered that the defendant should set off the debt and costs of the second action against the damages and costs of that in which the verdict was directed to be entered for the plaintiff.

The Court held that the award of such set-off could not be absolute and unconditional, but that it should be subject to and qualified by the lien of the plaintiff's attorney for his costs.

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BLOOMFIELD *v.* BLAKE, M. T. 1833. Ex. 2 *D. P. C.* 272.

Semble contra, in the absence

IN an action of trover, a verdict was obtained for 200*l.*, subject to be reduced to 1*s.*, upon the articles for which the action was brought

being delivered up. Before they were delivered up, the plaintiff became insolvent; but the defendant, nevertheless, on the application of the assignee, delivered up the goods to him. of notice or fraud.

And the Court held, that the plaintiff's attorney had no claim in respect of his lien for the costs, either against the assignee or the defendant, without shewing either express notice or making out a case of fraud.

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### 6.—*Waiver of**.

#### (*i*) Warrant of attorney to secure future costs†.

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## XI. BYE-LAWS CONNECTED WITH.

Rex *v.* Sheriffs of York, T. T. 1832. K. B. 3 *B. & Ad.* 770.

On motion for a mandamus to the corporation of York, to compel them to admit an attorney, it appeared, in the city of York, which was incorporated before the time of memory, there had been a Court from very ancient times, held, first, before the mayor and bailiffs, and, after a charter of Richard II., before the mayor and sheriffs. By a bye-law, made in the 3 & 4 Phill. & Mary, by a select body of the corporation, who had immemorially made rules and regulations as to the practice of the Court, and who had, at their discretion, selected the persons admitted to practise as attornies there, it was ordered, that, from thenceforth there should be no more than four persons admitted to be attornies in the Sheriff's Court; and, from that time, it did not appear that any more than that number had ever been allowed to practise. A bye-law in a city limiting the number of attornies to practise in a local Court is good.

The Court held, that the bye-law was reasonable, and that the usage, limiting the number of attornies to four, was sufficiently ancient to satisfy the statute, 2 Geo. 2, c. 23, s. 11.

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## XII. OF COMPENSATION, WHERE INFERIOR COURTS ARE OPENED.

* If an attorney, having a lien, parts with the papers, he waives his lien; but if he be wrongfully deprived of them, his lien remains, and he may maintain trover. (*Littledale*, J.—*Dicas* v. *Stockley*, T. T. 1836, N. P., 7 C. & P. 587).

† A warrant of attorney for future costs is bad. (*Patteson*, J.—*Jones* v. *Bland*, T. T. 1832, B. C. 1 D. P. C. 462). So, where costs have been incurred and money advanced, and warrant of attorney is given to secure that part of the claim, and also to secure future costs, it is void as to the latter, but valid as to the former. *Parke*, J.—*Holdsworth* v. *Wakeman*, H. T. 1833, B. C., 1 D. P. C. 532).

‡ Where the Lords of the Treasury directed a compensation to be made to A., an attorney of the Sheriff's Court of York, where the number was limited and the Court opened by the 5 & 6 Will. 4, c. 76, and the corporation refused to acquiesce, the Court granted a mandamus. (*Regina* v. *Mayor of York*, E. T. 1840, Q. B., 8 D. P. C. 502. Abridged, post, tit. *Mandamus*).

Attornment. See tits. *Ejectment—Landlord and Tenant—Use and Occupation.*

# Auction and Auctioneer.

See also tits. *Distress—Frauds, Statute of—Guarantee.*

I. OF THE AUCTIONEER'S LICENSE, p. 532.
II. OF THE CONDITIONS OF SALE, p. 532.
III. OF THE SALE.
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## I. OF THE AUCTIONEER'S LICENSE.

REX *v.* TAYLOR, T. T. 1824. Ex. 1 *M'Clel.* 362; S. C. 13 *Price*, 636.

Any mode of selling, whereby the highest bidder is to be the purchaser, renders it incumbent on the party to have a license.

AFTER premises had been advertised for sale by auction, the defendant, the vendor, proposed that the biddings should be by putting down two sums, written on slips of paper and given in, and the person whose slip contained the highest sum to be declared the purchaser; but that, if the lowest sum written was higher than any other, he should be entitled to the premises at such lowest sum; the purchase so made was, however, never completed.

*Per Cur.*—The object of the Legislature was to levy certain duties upon all sales, where there is an open competition among the persons wishing to become purchasers. The 3rd section of the statute (19 Geo. 3, c. 56) has provided for the shifts and evasions which may be resorted to for the purpose of defeating their object, by the words, "or by any other mode of sale at auction," or whereby the highest bidder is deemed to be the purchaser. Now, it cannot be denied, that this was a sale to the highest bidder, and therefore the vendor was liable, under 19 Geo. 3, c. 56, for the penalties for acting as an auctioneer without being licensed.

## II. OF THE CONDITIONS OF SALE.

SCELY *v.* GREW, E. T. 1836. K. B. 6 *N. & M.* 467.

One of the conditions of sale was, that on

THE declaration stated, amongst other conditions of sale, viz. That the highest bidder should be the purchaser; that the purchaser should pay, immediately, a deposit of 20*l* per cent. in part of the

purchase, and sign an agreement for payment of the remainder on or before the 25th March, 1834; and in case of further delay in the completion of the purchase, from any cause whatever, the purchaser should pay 5*l.* per cent. interest until payment, or the vendor should be entitled to the rents, at his option. In addition to the condition set out, there was (amongst others that were not material) the following: "Lastly. If the purchaser shall neglect or fail to comply with any of the above conditions, the deposit shall be forfeited, as liquidated damages, to be retained by the vendors, who shall be at full liberty to rescind the contract and re-sell the lot, either by public or private sale, without the necessity of previously tendering a conveyance thereof to the defaulter; and the deficiency, if any, by the second sale, together with all charges attending the same, shall be made good by the defaulter." It was objected, that under the above conditions of sale, the deposit of 20*l.* per cent. was to be retained by the vendor, as liquidated damages and in full satisfaction for a breach of the conditions by non-completion of the purchase; and that the last condition was a material qualification of the contract, and ought therefore to have been stated in the declaration. Lord *Denman*, C. J., at the trial, overruled the objection—

And the Court held, that the whole contract being broken, the plaintiff had a right to sue for general damages; that condition being intended only in case of a breach of any of the particular conditions.

failure to comply with any of the conditions, the deposit should be forfeited as liquidated damages; the defendant renounced the contract altogether:—Held, that the plaintiff might sue for general damages.

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DYKES *v.* BLAKE, E. T. 1838. C. P. 6 *Scott*, 320; S. C. 4 *Bing. N. S.* 463—S. P. BALLARD *v.* WRAY, M. T. 1835. Ex. 1 M. & W. 520.

IN an action for money had and received, it appeared that certain property was offered for sale by public auction, in lots. The particulars, in describing lot 12, stated that the purchaser of that lot would be entitled to a right of carriage and foot-way thirteen feet wide over lot 13, as shewn upon a plan annexed to the particulars, bearing and paying one moiety of the expense of keeping the road in repair. Lot 13 was described as "a first-rate building plot," with a frontage to a place called the Crescent Sweep; and it was stated that that lot would include the ground forming part of the Crescent Sweep, comprised within the boundary of lot 13 by a line marked upon the plan, subject for ever hereafter to the same rights of way and passage, and other rights and easements over the same, as are now enjoyed under the existing leases of the Crescent houses. The particulars of lot 7 described the two Crescent houses comprised in that lot as let on lease for a certain term, and stated that the lease might be seen at the office of the vendor's attorney, and would be produced at the sale. The plaintiff attended and bid at the sale. Lots 12 and 13 were severally knocked down to him, and he signed a single contract of purchase for the two at the foot of one of the

A misdescription in a condition of sale, calculated to mislead, but unintentional, vitiates the sale, and the vendee may recover back the deposit, with interest*.

* Where it is provided by the conditions of sale by auction that if any mistake be made in the description of the premises, or any other material error shall appear in the particulars of sale, such mistake or error shall not annul the sale, but a compensation shall be made; the vendee is not released from his contract by reason of a misdescription in the particulars of sale, obvious on inspection of the premises, unless such misdescription was wilful and designed. (*Park*, J.—*Wright* v. *Wilson*, Sum. Ass. 1832, N. P., M. & R. 207—S. P. *Waring* v. *Hoggart*, 1 R. & M. 39).

printed particulars, and paid a deposit. The plaintiff afterwards discovered that, in the leases of the Crescent houses, there was reserved to the occupiers a right of way, over lot 13, on foot and for the conveyance of gravel, manure, &c. from their gardens to the road. This right of way did not appear upon the plan.

The Court held, that, inasmuch as there was no sufficient disclosure of this right of way to enable a bidder, by the exercise of ordinary vigilance, to discover that such right existed; but, on the contrary, the plan being calculated to mislead, the misdescription, however unintentional, was such as to justify the plaintiff in refusing to accept either lot, (the two being comprised in one contract and the purchase of the one appearing to have induced the purchase of the other), but was entitled to recover back, with interest, the deposit paid to the auctioneer; and this, notwithstanding a condition annexed to the particulars of sale, that if any mistake were made in the description of the premises or any other error should appear in the particulars, such mistake or error should not annul the sale, but a compensation or equivalent should be given or taken, as the case might require.

## III. OF THE SALE.

### (*a*) Contracts at, and of the deposit*.

Bird *v.* Boulter, H. T. 1833. K. B. 4 *B. & Ad.* 443; S. C. 1 *Nev. & M.* 313.

An entry, by the auctioneer's clerk, in the sale-book, the latter having called out the name of the vendee, is sufficient to bind him.

The plaintiff, an auctioneer, was employed to sell wheat in the straw. One lot of wheat was knocked down to the defendant at the sum of 39*l.*, and upon the name of the defendant, as the purchaser, being called out, an entry was made in the sale-book by the plaintiff's clerk. In an action, by the auctioneer, for goods sold, the jury found for the defendant.

*Per Cur.*—We do not see why the clerk should not be the agent of both parties; nor, indeed, do we see why the auctioneer himself should not sign himself, as agent of the contracting party. It is certainly irregular that the contracting parties should act as each others' agents; but it is very different where the contract is signed by an individual who is not either of the contractors. Were it to be held otherwise, no broker could maintain an action, in his own name, for the breach of a contract signed by him; and at every auction, if the auctioneer or his clerk was not allowed to be the agent of the contracting parties, at every bidding, each purchaser would have to come to the table and sign his own name.

Roots *v.* Dormer, M. T. 1832. K. B. 4 *B. & Ad.* 77.

The sale of several lots, none of the va-

Several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue; a memorandum was

* If a party has given a bill of exchange or cheque for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or cheque. (*Parke*, B.—*Mills* v. *Oddy*, M. T. 1834, N. P., 6 C. & P. 728).

The plaintiff cannot, at the trial, insist upon any objections which he might have taken, but neglected to take, at the time of rescinding the contract, and which might have been remedied if taken before. (*Todd* v. *Hoggart*, M. & M. 128; S. C., 2 C., M. & R. 103; S. C., 3 D. P. C. 722; abridg. post, tit. *Cheque*).

signed afterwards by the bidder, stating that he agreed to become the purchaser of the several lots set against his name. On the question, whether the catalogue required a stamp, though the aggregate sum exceed 20*l.* in value, no single lot being of that price—

lue of 20*l.* each, does not render a stamp necessary to auctioneer's catalogue.

The Court held, that it did not render a stamp necessary to the catalogue.

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BARTLETT *v.* PARNELL, E. T. 1836. K. B. 4 *Ad. & E.* 792; S. C. 6 *N. & M.* 299.

IN assumpsit for goods bought at an auction, it appeared that the goods in question were sold at an auction under written conditions; and that the auctioneer wrote down the name of the defendant as the purchaser of a lot, the value of which was sought to be recovered in this action. Evidence was tendered and received by the Judge of a conversation which took place at the time of the sale, in which the plaintiff had disclosed to the auctioneer that the defendant was entitled to a legacy of 200*l*, by a will of which the plaintiff was executor, and that she might buy to the amount of the legacy without being called upon to pay. This was objected to as evidence varying a written contract, the signing by the auctioneer being a signature sufficient to make an agreement between the parties according to the terms of the conditions of sale, which were to pay 20*l.* per cent. down, and the residue on delivery. The learned Judge directed the jury, that if they were of opinion that the parol contract, as proved, existed, they should find for the defendant. The jury found a verdict for the defendant. On motion to set it aside—

On a sale by auction, it may be shewn that the sale was under a private contract, and not the conditions of sale.

*Per Cur.*—This decision does not at all infringe on any of the cases which have been decided, that when conditions of sale are annexed to the contract, you cannot vary those conditions by parol evidence. Here the defendant is not to be considered as a purchaser under the conditions of sale regulating the payment; but before the sale an agreement is entered into between the plaintiff and the defendant, that whatever she may buy at the auction, to the amount of 200*l.*, shall be set-off and allowed out of her legacy.

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### (*b*) PUFFING AT.

CROWDER *v.* AUSTIN, H. T. 1826. C. P. 11 *Moore*, 283; S. C. 3 *Bing.* 368; S. C. 2 *C. & P.* 208—S. P. WHEELER *v.* COLLIER, M. T. 1827, N. P., 1 *M. & M.* 123.

THE plaintiff having sent a horse to a repository to be sold at public auction, his groom attended and bid for the horse on behalf of his master, without its being announced to the company present that he attended for such purpose. In an action to recover the value of the horse sold at the auction—

A servant bidding for his master, without the knowledge of the vendee, vitiates the sale*.

* In *Rex* v. *March*, T. T. 1839, Eq., 3 Y. & J. 331, the Court held, that the employment of a puffer at a sale by auction of property seized under an extent by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale, and may be taken advantage of by the vendee, notwithstanding misconduct on his part.

And, in *Levi* v. *Levi*, (M. T. 1833, N. P. 6 C. & P. 239), *Gurney*, B., held, that if brokers agree to buy at an auction, in order to re-sell the goods, and divide the profits, it is a conspiracy.

The Court held, that the whole transaction was a scandalous fraud on the defendant; and that the reasoning of Lord *Mansfield*, in *Bexwell* v. *Christie*, (Coup. 306), must govern the present case; and more particularly so as Lord *Kenyon*, in *Howard* v. *Castle*, (6 T. R. 642), said, "That the whole of the reasoning in *Bexwell* v. *Christie*, was founded on the noblest principles of morality and justice, principles that are calculated to preserve honesty between man and man." Lord *Mansfield* there mentioned an instance in which the owner may legally and fairly bid at the auction; namely, where before the bidding begins he gives public notice of his intention, and in such a case no duty is to be paid.

## IV. OF THE AUCTION DUTY.

REX *v.* WINSTANLEY, H. T. 1828. Ex. 2 *Y. & J.* 124 (*), *confirmed in Dom. Proc.*; 1 *C. & J.* 434; S. C. H. T. 1829. Ex. 3 *Y. & J.* 126, *doubting the law in* 2 *Y. & J.* 124.

On the sale of the interest of a bankrupt in an estate in fee, which is in mortgage, the auction duty does not attach†.

THE question in this case was, whether a sale by auction, by assignees of a bankrupt, of the absolute interest in an estate in fee which is in mortgage, was liable to the auction duty.

*Per Cur.*—Had it not been for the case of the *King* v. *Abbott*, (3 Price, 178), which has been relied upon by the counsel for the Crown, we should not have entertained the slightest doubt upon this subject; that case turned upon the stat. 19 Geo. 3, c. 56, s. 15. The question in this case, however, depends upon the construction of the 98th section of the 6 Geo. 4, c. 16, which enacts, that all sales of any real or personal estate of any bankrupt or bankrupts, shall not be liable to any auction-duty. Now, it is clear that the auction-duty must eventually come out of the bankrupt's estate; therefore, the exemption from that payment is an advantage to the estate and a benefit to the creditors generally, which it was the object of the Legislature to furnish. Under these circumstances, we are clearly of opinion, that the auction-duty is not payable in respect of this sale.

* Doubting the case of *King* v. *Abbott*, (3 Price, 178).

† So, where a bankrupt had mortgaged his real estates and afterwards conveyed them to trustees, with large powers for paying off incumbrances, a sale was afterwards ordered by the commissioners, with concurrence of the trustees, but without consulting the mortgagee:—Held, that the auction duty was not payable on the whole or any part of the produce of the sale; so, although there had been no conveyance to trustees, but the sale of the bankrupt's interest had been by the order of the commissioner, without consulting the mortgagee. (*Attorney-General* v. *Winstanley*, 2 Dow. & Cl. (*p*) 302).

In *Jones* v. *Nanney*, (H. T. 1824, Ex. 1 M'Clel. 25; S. C. 13 Price, 76), where the defendant, after several others, bid for a lot and the auctioneer suspended the sale, in order to give time to those present to consider, and, upon his return, declared that it was an open sale as to that lot, and subsequently knocked it down to defendant; but he refused to complete the purchase, or sign any memorandum, and his name was never set down by the auctioneer in his book. The latter subsequently paid the auction-duty on the lot, and brought an action to recover it from the defendant. It appeared, by one of the conditions, that the duty was to be paid by the purchaser:—Held, that, there being nothing to bind the defendant to the contract, he could not be deemed the purchaser, and that the action was not maintainable. And the defendant not being originally liable, the plaintiff could not recover for money paid.

REX *v.* SEDGWICK, M. T. 1835. Ex. 2 *C., M., & R.* 603; S. C. 1 *T. & J.* 94.

A FREEHOLD estate was put up to auction in several lots, the whole being subject to an entire mortgage. By the conditions of sale, the mortgage was apportioned among the different lots, and the purchaser of each was to pay to the mortgagee the amount so apportioned, and to be indemnified againt the surplus beyond it. The mortgagee refused to concur in the sale. On a sci. fa. on the auctioneer's bond—

But, where mortgaged premises are sold, without the consent of the mortgagee, but subject to the mortgage, the auction-duty is payable on the sum paid.

*Per Cur.*—The mortgagor sells, subject to the mortgage and without the concurrence of the mortgagee. The question would have been very different if the latter had concurred in the sale; then they would both have sold the whole estate. If both take advantage of the auction, they must both pay for the benefit. Here, however, the mortgagor sells, and the mortgagee is passive. The mortgagor sells only the equity of redemption, charged with the mortgage. If the terms of the sale which the purchaser has signed be looked at, it will be seen that the conditions are referred to; and according to them, the estate is sold, subject to a certain sum of money, which is a portion to be borne by that part of the estate, as settled by the mortgagor. It is perfectly clear that the purchaser was to pay that sum to the mortgagee; because all that is in the particulars is, that the mortgagor shall indemnify him against the residue. The estate is sold, charged with that sum. It is, in truth, the equity of redemption which has been sold for 5300*l.*, and the auction-duty ought to be calculated on that amount only.

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MALINS *v.* FREEMAN, E. T. 1838. C. P. 6 *Scott*, 187; S. C. 4 *Bing. N. S.* 395.

BY the 17 Geo. 3, c. 50, s. 8, the vendor, at an auction, is empowered to make it a condition of sale that the purchaser shall pay the auction-duty, in addition to the purchase-money; and it is declared, that, upon his neglect or refusal to pay the same, the bidding "shall be null and void to all intents and purposes." In an action for not completing a contract of sale by auction—

Under a condition of sale, that the vendee shall pay the auction-duty, and, in default, the "bidding shall be null and void:"—Held, that the contract was voidable only at the option of the vendor.

The Court held, that the contract was not, by reason of such neglect or refusal, absolutely void, but voidable only at the option of the vendor. It would be manifestly contrary to reason and justice so to construe it as to enable the purchaser to avail himself of his own default to avoid his contract.

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## V. OF THE RIGHTS OF THE AUCTIONEER*.

ADAMSON *v.* JARVIS, H. T. 1827. C. P. 4 *Bing.* 66; S. C. 12 *Moore*, 241.

A COUNT in a declaration in an action on the case, stated that the defendant represented and affirmed to the plaintiff that he, the defendant, was legally entitled to sell and dispose of certain goods,

Assumpsit lies by an auctioneer against a party who al-

* In an action by the assignees of a bankrupt for goods sold by the defendant, it was held, that the auctioneer was entitled to deduct rent paid and the expenses of sale, but not of removing the goods nor commission on the sale. (*Tindal*, C. J.—*Grimshaw* v. *Atterwell*, H. T. 1837, N. P., 8 C. & P. 6).

leges himself to be the owner of property of which he is not, whereby he had to pay the true owner.

and requested the plaintiff to sell the same by public auction; that the plaintiff, confiding in such representation and affirmation, sold the same, and, after deducting certain expenses, paid over the residue to the defendant; whereas the defendant deceived and defrauded the plaintiff in this; to wit, that the defendant was not, at the time of the sale, legally entitled to sell and dispose of the goods. The plaintiff then averred that an action was brought against him by the true owner, and that the plaintiff was obliged to pay the value thereof, together with the costs of the action.

The Court held the declaration sufficient after verdict, although it was objected that there was no averment that the defendant repesented to the plaintiff that he was legally entitled to sell, or that the goods were put up to sale at the request of the defendant or on his retainer, and that there was no retainer shewn at the time of the request to put up the goods to sale.

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DICKENSON *v.* NAUL, E. T. 1833. K. B. 4 *B. & Ad.* 638; S. C. 1 *N. & M.* 721.

But an auctioneer, who is employed by the supposed real owner, cannot maintain an action for the price, though the vendee promised to pay to him.

THE plaintiff, an auctioneer, was employed to sell by a party supposed to be executrix; but the real executrix afterwards claimed the amount from the purchaser. In an action, by the auctioneer against the purchaser, for goods sold and delivered, it appeared that the plaintiff, by order of A. B., sold goods by auction to the defendant, who was about to take them away, when the plaintiff objected to their removal without payment. Upon this, the defendant promised the plaintiff to pay for the goods as soon as the bill was made out. Lord *Denman*, C. J., nonsuited the plaintiff. On motion to set it aside—

*Per Cur.*—An auctioneer has a right of action for goods sold by him in the course of his business. And, undoubtedly, the auctioneer may sue where the right of no third person has intervened. But where such right is established, and the person employing the auctioneer is proved not to have been the owner, it then becomes clear, that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the property against the right owner.

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PITCHERS v. EDNEY, T. T. 1830. C. P. 4 *Bing. N. S.* 721; S. C. 6 *Scott*, 582.

Under the Interpleader Act, an auctioneer who paid the deposit into Court, was held, at the end of the suit, to be entitled to his costs out of the deposit-money*.

THE defendant, an auctioneer, sold leasehold property by auction. Some questions arising as to the title, the plaintiff refused to complete the purchase, and brought an action against the defendant to recover back the deposit-money. The defendant having applied to a Judge at Chambers, under the Interpleader Act, (1 & 2 Will. 4, c. 58), an order was made, on the 21st April, that the defendant should pay the 29*l.* into Court. On an application that the defendant have leave to take the money out of Court, and to be allowed to receive the amount of his costs out of that fund—

* Where an auctioneer was employed to sell ground-rents, on the terms of one per cent. "on sale," who took active measures with respect to the sale, but, before the day of sale, his employer sold the ground-rents:—Held, that, by the custom of the trade, the auctioneer was entitled to his full commission, though the sale was not effected by him. (*Denman*, C. J.—*Rainy* v. *Vernon*, T. T. 1840, N. P., 9 C. & P. 559).

*Per Cur.*—We do not mean to lay down any general rule, that the stakeholder is, at all events, entitled to costs out of the fund, when the third party does not appear; but the Court is authorized to do what is just and reasonable; and where the plaintiff has a remedy over against the wrong-doer, the stakeholder should be indemnified out of the fund.

## VI. OF THE DUTIES AND LIABILITIES OF THE AUCTIONEER.

### Gray *v.* Gutteridge, H. T. 1828. K. B. 1 *M. & R.* 614; S. C. 3 *C. & P.* 40.

An auctioneer, being a stakeholder, must act as the agent of both, as regards the deposit.

An auctioneer, immediately after receiving the deposit-money, paid it over to his principal, the vendor; and the contract was afterwards rescinded. In an action by the vendee, against the auctioneer, to recover the deposit-money—

The Court held him liable, although he had received no notice not to pay it over, and although, when he did so, there was no reason to suppose that the purchase would not be completed; for he is not justified in considering himself merely as the agent of the vendor who employs him. He is a stakeholder for both parties.

### Sykes *v.* Giles, M. T. 1839. Ex. 5 *M. & W.* 645.

As soon as a sale has taken place, and the deposit-money paid, the authority of the auctioneer is at an end, and he has no implied authority to receive or to make any contract for payment of the remainder; at all events, not to take bills in payment,

A sale of timber took place under the following conditions, which were publicly read at the time of sale, in the presence of the defendant: "That each purchaser should pay down a deposit of 10*l.* per cent. in part of the purchase-money, and pay the remainder on or before the 17th August; but, in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of 5*l.* per cent. would be allowed." Also, "That each shall enter into a proper agreement and bond, if required, with such one, two, or more sureties as should be approved by the vendor, or his agent, for the performance of his agreement, pursuant to the above conditions." The defendant became the purchaser of one lot, and paid the deposit. Some days after the sale, which was on the 14th February, the defendant, at the auctioneer's request, drew a bill of exchange for the residue of the purchase-money, dated on the day of the sale, on one J. M., payable six months after date to his own order, and indorsed it to the auctioneer; who, being in difficulties, indorsed it to a third person, to whom he was indebted on his own account. The bill became due on the 17th August, when the amount of it was duly paid to the holder. It was never transferred to the plaintiff.

*Per Cur.*—An auctioneer has authority to sell under the instructions he has received, and here those instructions appear from the conditions of sale. By the conditions in the present case the vendee is to pay a deposit of 10*l.* per cent., and the remainder on or before the 17th August, but he is not to pay it to the auctioneer. As soon as the sale has taken place, and the deposit-money paid, the authority of the auctioneer is at an end, and he had no authority to make any contract for payment of the remainder. The conditions do not specify who is the agent of the vendor, but the agency of the

auctioneer being at an end, he had no authority to receive the money, and most clearly not to take the bill of exchange.

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EARL OF FERRERS *v.* ROBINS, E. T. 1835. Ex. 2 *C., M., & R.* 152.

unless with the consent of his employer,

AN auctioneer was employed to sell goods by auction, and for ready money only. He sold them by private contract, and took a bill, drawn and indorsed by the purchaser generally. His employer at first refused to take the bill, but afterwards, and before it was due, did take it. On motion for a new trial—

*Per Cur.*—It was properly left to the jury to say, whether the plaintiff had consented to take the bill in payment, and they having found that he had not, we think it was not an answer to the action for the defendant's breach of duty if he had sustained damage by neglect of the plaintiff to present, or give notice of dishonour, he would have a right of action against him. It was dishonoured when due, but notice was not given in time to the parties to the bill, nor to the auctioneer, that may be the subject of a cross action; the jury having found for the plaintiff, we cannot interfere.

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GABY *v.* DRIVER, M. T. 1828. Ex. 2 *Y. & J.* 549.

An auctioneer, whose vendor cannot make a good title is not liable to interest on the deposit*,

IN assumpsit against the defendant, an auctioneer, it appeared that he, as agent for the vendor, agrees to sell an estate upon the terms contained in conditions of sale, by which the purchaser is to pay down immediately a deposit, and the auction duty, and the residue of the purchase.money, upon a day certain, on having a good title, and the vendor is to prepare and deliver to the purchaser an abstract of title; which he having failed to do, the question was, whether he was liable to interest.

*Per Cur.*—A sum of money is paid into the hands of an auctioneer for the purpose of retaining it, until a particular conveyance is completed. At this period he is admitted to be a stakeholder for both parties. When, then, does that character cease? It is said, at the moment when the conveyance should have been completed. He cannot, however know, unless a demand be made upon him to return the money, that the negotiation is still on foot, and that the title is not in the progress of investigation. It is impossible to say when the conveyance may be completed, or when the negotiation may ultimately fail. We admit that when the contract has been finally broken off, he should return the deposit; but he has a right to notice that his character of stakeholder has ceased before he can be charged personally with interest, on account of the detentiou of this money.

*See S. P. Ballard* v. *Wray*, 1 *M. & W.* 520.

* A lessee of lands subject to a covenant, against certain obnoxious trades, with a proviso for re-entry, grants under-leases of houses erected on the land, not containing a similar covenant and proviso:—Held, that a purchaser, by auction of houses on the same land, and of the improved ground rents of the houses so underlet, might recover back his deposit money, this omission in the under-leases not having been mentioned in the conditions of sale. (*Abbott*, C. J.—*Waring* v. *Hoggart*, H. T. 1824, N. P., R. & M. 39). In all cases, if property be sold at auction under a description which is untrue, and calculated to entrap persons coming into the auction-room, the sale is void, and the purchaser may recover back his deposit in an action for money had and received. (*Tindal*, C. J.—*Robinson* v. *Musgrove*, H. T. 1838, N. P., 8 C. & P. 469).

HARINGTON *v.* HOGGART, M. T. 1830. K. B. 1 *B. & Ad.* 577.

A DEPOSIT upon the contract for sale of an estate was paid the auctioneer. There being difficulties in the title the sale was not completed until several years had elapsed. The vendor, in the interim, gave notice to the auctioneer to invest the money in government securities, and offered to indemnify him for so doing, but he did not obtain the consent of the purchaser to this arrangement. The auctioneer was in the habit of keeping a considerable sum at his bankers', to answer the demands which might be made upon him for deposits. Of the remainder of these deposits he made a profit, but it did not appear whether he made a profit of this particular sum, all trace of which was lost in its mixture with the bulk. In action by the vendor against the auctioneer, after the sale had been completed—

even though the vendor gave him notice to invest it in government securities;

The Court said the auctioneer was a stakeholder. A stakeholder is bound to pay to the party ultimately entitled what is deposited with him, as soon as it is determined which of the parties is entitled to it; but it seems inconsistent with such a liability that he should be bound to pay interest; for if he is bound to pay interest, and is to make interest by laying it out in some way or other, that interest must be made at the risk of the party entitled.

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DUNCAN *v.* CAFE, H. T. 1837. Ex. 2 *M. & W.* 244—S. P. CURLING *v.* SHUTTLEWORTH, T. T. 1829. C. P. 3 *M. & P.* 368; S. C. 6 *Bing.* 121.

BY an agreement of reference pursuant to a Judge's order, between G. and H. professing to be administrator, cum testamento annexo, and all matters were referred to an arbitrator, who directed certain premises to be sold by an auctioneer, assented to by both parties, and the purchase-money to be applied in a particular manner. G.'s attorney, who knew that administration had not been taken out by H., became the purchaser at the sale, and paid a deposit to the auctioneer; it being understood at the time of the sale that H. would take out such letters of administration. This he refused to do.

but he may be sued for the deposit, without giving him notice of rescinding the contract.

Held, first, That the purchaser could recover his deposit from the auctioneer without notice of his rescinding the contract; secondly, That he was not prevented from taking the objection by his previous knowledge of the defect; and, thirdly, That an attornment of one of the tenants to the purchaser was no answer to this action.

*See Ballard* v. *Wray*, 1 *M. & W.* 520.

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CROSSKEY *v.* MILLS, T. T. 1834. Ex. 1 *C., M., & R.* 298.

IN an action against the defendant, an auctioneer, for not accounting, it appeared that the elder brother, and creditor, of an intestate, being in possession of the goods of the intestate, under a bill of sale, said that he should not insist on his bill of sale, but said that he should divide the goods with the other creditors, and he employed the defendant, an auctioneer, to sell the goods. After the sale, by the defendant, the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff, but to retain the money until all the creditors should come in, that it might be divided rateably amongst them. No letters of administration were taken out. The plaintiff had a verdict. On motion to enter a nonsuit—

An auctioneer is bound to account to his employer, unless he can shew another party has a paramount title.

*Per Cur.*—It is clear that the plaintiff was the person who originally employed the defendant to sell. Therefore, primâ facie, the defendant was bound to account to the plaintiff, admitting that the defendant could set up the jus tertii, and shew that he was liable to account to a third person. The goods might belong to the person taking out administration, but it is not shewn here that there was a title in any third person. No person has taken out letters of administration. All that appears is, that the defendant had general instructions to sell, and that the sale was said to be for the benefit of the creditors. It may be that the plaintiff was a trustee for them.

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CURTIS *v.* GREATED, E. T. 1834. K. B. 1 *A. & E.* 167; S. C. 3 *N. & M.* 449.

In an action by the vendee to recover back a deposit, where there is a contract of sale, the witness may be asked whether such contracts relate to the deposit.

IN an action of assumpsit by the plaintiff, as vendee of an estate, against the auctioneer, to recover the deposit upon a failure of title, the auctioneer's receipt and the conditions of sale were produced, one of which conditions prescribed the execution of an agreement by the vendor. A witness for the plaintiff on cross-examination stated that there was a written agreement respecting the sale, signed by the vendee. He was then asked by the defendant's counsel whether this agreement related to the deposit. The question was objected to, and the Lord Chief-Justice would not allow it to be answered. A verdict was found for the plaintiff, and leave given to move to enter a nonsuit. On motion for that purpose—

*Per Cur.*—The defendant was entitled to ask whether that agreement related to the deposit, as the answer might make it incumbent on the plaintiff to produce the writing as part of his case.

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## Audita Querela*.

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SYMONS *v.* BLAKE, T. T. 1835. Ex. 2 *C., M., & R.* 416; S. C. 4 *D. P. C.* 263.

An auditâ querelâ will lie

A PLAINTIFF recovered damages for slander; and after verdict, and before judgment, was tried and convicted of the felony which

* An auditâ querelâ lies where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment; as if the plaintiff has given him a general release; or, if the defendant has paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like, wherein the defendant has good matter to plead, but has had no opportunity of pleading it, (either at the beginning of the suit, or puis darrein continuance, (see post, that title), before judgment), an auditâ querelâ lies in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the Court, stating that the complaint of the defendant has been heard, auditâ querelâ defendentis, and then setting out the matter of the complaint, it at length enjoins the Court to call the parties before them; and, having heard their allegations and proofs, to cause justice to be done between them. It also may be supported by bail when judgment is obtained against them by scire facias to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed; for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they that have redress by auditâ querelâ, which is a writ of a most remedial nature, and seems to have been invented lest in any case there should be an

had been imputed to him, the defendant in the action being a witness against him on that prosecution, the Court declined to interfere summarily, inasmuch as questions of doubt might arise on the auditâ querelâ as to the effect of the forfeiture and the rights of the Crown. And said, where it is clear that a writ of auditâ querelâ will lie, the Court will interfere summarily on motion, and stay execution, though they will not do so where there is any doubt as to the facts or the law of the case.

where there is doubt as to the facts or law of the case.

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HANSON *v.* BLAKEY, H. T. 1828. C. P. 1 *M. & P.* 261; S. C. 4 *Bing.* 493.

THE plaintiff sued the defendants, who were bankrupts, and signed judgment against them, by default, in Trinity Term, and entered up final judgment, and issued execution in Michaelmas Term following. The defendants obtained their certificate on the 18th November, and the Sheriff's officer, notwithstanding he had notice of that fact, on that day seized a haystack, and was about to sell it, when the defendants obtained a Judge's order, that the proceedings under the execution should be stayed on their paying the amount of the debt and costs, with Sheriff's poundage, into Court, to abide the event of a motion. The defendants having applied to have the money paid out to them—

Where money is paid into Court by bankrupts who obtain their certificate the day execution is levied, the Court will leave the parties to an auditâ querelâ.

*Per Cur.*—We are quite clear, that if the defendants have any remedy, they ought to avail themselves of it by auditâ querelâ. The Court will never decide this on a summary motion, without giving the other party an opportunity of bringing his writ of error. In doubtful cases the Court will not decide on motion; for, although the decision might be wrong, there would be no appeal. This case appears to be extremely doubtful, as it depends on the construction of a very badly framed act of Parliament. We therefore think that if the defendants have any remedy, which is very questionable, they must proceed by auditâ querelâ.

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## Author.

PLANCHE *v.* COLBURN, M. T. 1831. C. P. 1 *M. & Scott*, 51; S. C. 8 *Bing.* 14; S. C. 5 *C. & P.* 58.

IN an action for work and labour, it appeared that the defendants engaged plaintiff to write a work for a certain sum, for a particular publication. After the plaintiff had done a portion of it the defendants abandoned the publication. At the trial, it was proved that the plaintiff had written a large portion of the work, and had incurred some expense; but it did not appear that he had tendered any part of the MS. to the defendant. The plaintiff obtained a verdict for 50*l.* On motion for a new trial—

An author who compiles a work which the publisher ceases to publish, may sue for his work and labour, though he has not tendered the MS.*

*Per Cur.*—An author writes for profit and reputation, and it

oppressive defect of justice where a party who hath a good defence is too late to make it in the ordinary forms of law. But the indulgence so shewn by the Courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of auditâ querelâ, and it is seldom resorted to in practice.

* An author may maintain an action for injury to his reputation against the publisher of an inaccurate edition of his work, falsely purporting to be executed

might be a great sacrifice of the latter motive, if a work composed expressly for a work like this, a juvenile library, were to be printed in a different form, and to go forth to the world as a publication to grown-up people. While the special contract was open, the plaintiff could not resort to the common counts, but by abandoning "The Juvenile Library." The defendants broke that contract, and the plaintiff, who ought not to suffer by the default, is entitled to recover for the work and labour he has actually performed for the defendants at their request.

*See Patmore* v. *Colburn*, 1 *C., M., & R.* 65.

## Autre Action Pendant.

KERBEY *v.* SIGGERS, E. T. 1834. Ex. 2 *D. P. C.* 659.

A plea of another action pending in another court, with a prout patet per recordum, is supported by production of a record of the writ.

To trespass plea, the pendancy of another action in the Common Pleas, for the same identical trespasses, concluding with a prout patet per recordum. To support the plea, it was contended that the entry of an award, of a writ of summons out of the Common Pleas, between the same parties, was sufficient. No notice having been given that the writ was abandoned—

*Per Cur.*—If a writ be produced, it is a sufficient compliance with the plea.

## Autrefois Acquit*.

(See 2 *Peters. Ab.*)

REX *v.* TAYLOR, M. T. 1824. K. B. 3 *B. & C.* 502; S. C. 5 *D. & R.* 422.

A plea of autrefois acquit must not state the acquittal to be in a different year to that in the indictment.

THE defendant was indicted for a misdemeanour, in keeping a common gaming-house. The offence was laid on a day, in 2 Geo. 4, and in the usual words, on divers other days, and times, between that day and the day of the inquisition. The defendant pleaded autrefois acquit, of an indictment found in 4 Geo. 4, for keeping a gaming-house, laying the offence on a day in 57 Geo. 3, and on

by him, though the publisher be the owner of the copyright. (Lord *Tenterden*, C. J.—*Archbold* v. *Sweet*, H. T. 1832, N. P., M. & R. 163; S. C. 5 C. & P. 219).

Since the new rules of pleading, the denial of the promise in assumpsit is not a denial of that on which it is founded; therefore, where a declaration stated that the plaintiff had composed and written the music and poetry of an opera, and as such composer and author had a right to the music and poetry, and in consideration of the premises, and that the plaintiff would sell him such right, the defendant undertook to buy it, &c. the defendant pleaded only that he did not undertake and promise in manner and form, &c.:—Held, that under this plea he was not at liberty to contend either that the plaintiff did not sell, or that he had not the right, or that he was not the author. (*Tindal*, C. J.—*De Pinna* v. *Polhill*, T. T. 1837, N. P., 8 C. & P. 78).

* The prisoner was indicted singly for receiving stolen goods. Plea, autrefois acquit, under an indictment against him and four others, on which one was convicted, and the prisoner and the three others were acquitted:—Held good. (*Rex* v. *Dann*, Sum. Ass., 1835, N. P., M. C. C. 424; Semble contrà *Parke*, B.—*Rex* v. *Parker*, Sp. Ass., 1837, N. P., 7 C. & P. 825). So, if the prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment. (*Burrough*, J.—*Rex* v. *Sheen*, Old Bailey, 1827, 2 C. & P. 634). But

divers other days between that day and the day of the inquisition, against the peace of the king.

The Court held, that the offences in that latter indictment must be taken to be against the peace of Geo. 3, and, therefore, that the defendant had not been acquitted of offences against the peace of Geo. 4.

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**Autrefois Attaint.** See 2 Peters. Ab.

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**Autrefois Convict*.** See 2 Peters. Ab.

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**Authority.** See tit. *Principal and Agent.*

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**Avowry and Cognizance.** See tit. *Replevin.*

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**Award.** See tits. *Arbitration—Inclosure.*

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an acquittal on an indictment for having been present aiding and abetting in a felony is no bar to indictment charging the party as accessary before the fact. (*Rex* v. *Birchenough*, Sum. Ass. 1836, N. P., M. C. C. 477). So, a person who is tried for felony as a principal, and acquitted, cannot plead that acquittal in bar of another indictment, which charges him with being an accessary before the fact to the same felony. (Lord *Denman.—Rex* v. *Plant*, 1836, N. P., 7 C. & P. 575; and confirmed by all the Judges). If, in a plea of autrefois acquit, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But semble, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it. (*Burrough*, J.—*Rex* v. *Sheen*, Old Bailey, 1827, 2 C. & P. 634). A prisoner, in pleading autrefois acquit, in a case of felony, has not a right to a copy of the second indictment, but he has a right to have the indictment read slowly. (*Parke*, B.—*Rex* v. *Parker*, Sp. Ass. 1837, N. P., 7 C. & P. 825).

* The Court will not reject a plea of autrefois convict, on account of the informal manner in which it is handed in by the prisoner, but will assign counsel to put it into a formal shape, and postpone the trial to give time for its more perfect preparation. (*Littledale*, J.—*Rex* v. *Chamberlain*, 1833, O. B., 6 C. & P. 93).

A plea of autrefois convict stated that the prisoner was indicted, convicted, and sentenced, at a sessions of the peace duly holden by adjournment, on Friday the 5th of July. The record produced in support of the plea stated that the indictment was found at a session commenced and holden on Monday the 1st of July, and that the Court was adjourned till Tuesday the 2nd; and that the Court having re-assembled on Thursday the 4th, was adjourned to Friday the 5th, when the prisoner was tried and convicted. It was held, that the plea of autrefois convict was not proved by the record, inasmuch as, for want of an adjournment from the Tuesday to the Thursday, the proceedings on the Friday were coram non judice, and therefore a nullity. (*Parke*, J.—*Rex* v. *Bowman*, 1834, O. B., 6 C. & P. 337).

# Bail, in Civil Proceedings*.

(*See* 3 *Peters. Ab.* 1).

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First.—*OF BAIL TO THE SHERIFF, AND THE PROCEEDINGS INCIDENT THERETO.*

## I. IN WHAT CASES THE SHERIFF IS, OR IS NOT, BOUND TO TAKE BAIL*.

## II. OF THE NATURE AND FORM OF THE BAIL-BOND.

(*a*) Number of sureties required†.

(*b*) In what name it must be made‡.

(*c*) In what sum to be taken§.

(*d*) Necessity of its being under seal‖.

(*e*) When it must be executed¶.

* Upon an attachment for non-payment of money at common law, (see 2 B. & A. 56; 6 Taunt. 569; S. C. 2 Marsh. 280), or an attachment out of Chancery, (see Sty. Rep. 212; 2 Black. Rep. 955; H. Bl. 168), the sheriff may take bail, but he cannot on a criminal charge. (4 T. R. 505; 2 H. Bl. 418).

† There should not be less than two sureties, (*Matson* v. *Borth*, 5 M. & S. 223), and not one only.

Where the sheriff had taken but one bail the Court set aside the attachment, on the application of the bail, although it would not do so at the instance of the sheriff. (*Rex* v. *Middlesex Sheriff*, E. T. 1833, B. C., 2 D. P. C. 140. See 2 C., M., & R. 698; 9 Moore, 422; 2 Bing. 227).

‡ If one bail be described by one only of two Christian names, and the other by initial, the bond will be cancelled. (*Ogden* v. *Barker*, M. T. 1831, K. B., 1 D. P. C. 125).

§ The bail-bond should be in double the sum sworn to, (*Norden* v. *Rawsley*, 2 Wils. Rep. 69), and not in a larger amount than required by the practice of the Courts. (*Wingrave* v. *Godmond*, E. T. 1833, N. P., 6 C. & P., 66). But, where a party is arrested upon a special affidavit, the Court in their discretion will reduce the amount upon counter affidavits. (*Hutt* v. *Capelin*, M. T. 1837, C. P., 5 Scott, 415). Where formerly the ac etiam was required, its omission, or if informal, entitled the defendant to have the sum in the bail-bond reduced, but not cancelled. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 155).

‖ The bail-bond must be under seal. (13 Car. 2, st. 2, c. 2, s. 2).

¶ It may be executed before arrest. (1 Stra. 444). But not before warrant. (8 T. R. 187).

(*f*) CONDITION OF THE BOND*.

(*g*) OF STAMPING THE BOND†.

(*h*) OF THE FORFEITURE‡ AND ASSIGNMENT.

1. *What Bonds are assignable*§.

2. *Assignment, when and how to be made*‖.

(*i*) OF THE ACTION ON THE BAIL-BOND¶.

1. *Against whom to be brought, and when***.

* The bond is conditioned for the defendant to put in bail within eight days from the time of the arrest, in the Court out of which the process issued. (2 Will. 4, c. 39). The bond being conditioned to appear in eight days after the date, the arrest being the same day, is valid. (*Evans* v. *Moseley*, H. T. 1834, Ex., 2 D. P. C. 364). Where the condition of the bond was left in blank as to the name of the party to whom the copy of the writ had been delivered, and also the name of the party arrested:—Held void. (*Holding* v. *Raphael*, M. T. 1835, K. B., 5 Nev. & M. 655).

† The bail-bond requires no stamp.

‡ If bail be not put in, in conformity with the condition, on or before the eighth day from the time of the arrest, the bond is forfeited. (2 Will. 4, c. 39).

§ In general, all bail-bonds are assignable, and the sheriff is bound to assign. But a bail-bond is not assignable under the 4 Anne, c. 16, s. 20, where taken under a writ of attachment for a contempt of court for not putting in an answer in Chancery. (*Miller* v. *Palfreyman*, M. T. 1832, K. B., 4 B. & Ad. 146).

‖ Since the Uniformity of Process Act, 2 Will. 4, c. 39, s. 4, abrogating rule H. T. 2 Will. 4, where a party held to bail on a capias does not put in special bail within eight days after the process executed on him, including the day of execution, the plaintiff is entitled immediately to put the bond in suit, (*Hillary* v. *Rowles*, T. T. 1833, K. B., 5 B. & Adl. 460; 2 D. P. C. 201), notwithstanding a render. (*Hodgson* v. *Mee*, T. T. 1835, K. B., 302; 5 N. & M. 302). Semble contra after notice of render, plaintiff cannot take an assignment of the bail-bond and commence proceedings; and, if he does, proceedings will be stayed upon payment of the costs of the assignment only. (*Short* v. *Doyle*, T. T. 1835, Ex., 4 D. P. C. 202). The plaintiff cannot be a witness to the assignment, as the 4 Anne, c. 16, s. 20, implies that the witnesses shall be disinterested persons. (*Wright* v. *Barrett*, E. T. 1836, Ex., 1 M. & W. 424; S. C. 5 D. P. C. 64). But, it is not essential upon the assignment of the bail-bond, that the witnesses should attest, by subscribing their names at the time of the execution of the assignment. (*Phillips* v. *Barlow*, H. T. 1835, C. P., 1 Bing. N. S. 433; 3 D. P. C. 381; 1 Sc. 322; 6 C. & P. 781).

¶ No action can be maintained on a bail-bond against a surety where the forfeiture takes place before his bankruptcy. (*Coulson* v. *Hammon*, H. T. 1824, K. B., 2 B. & C. 626; S. C. 4 D. & R. 160—S. P. *Littlewood* v. *Crowther*, M. T. 1823, K. B., 3 D. & R. 533). Nor pending rule to bring in the body. (*Reg. Gen.* H. T. 2 Will. 4).

** If the defendant do not put in special bail within eight days after the execution of the writ, inclusive of the day of execution, the plaintiff will be entitled either to take an assignment of the bail-bond, or proceed against the sheriff; and, before 2 Will. 4, c. 39, he could not put the bond in suit, when taken in London or Middlesex, until the expiration of four days; and, if taken elsewhere, until after the expiration of eight days, exclusive of the day limited by the terms of the process for defendant's appearance. (R. H. T. 2 Will. 4. See also 4 B. & C. 864; 7 D. & R. 374). But this practice is considered to be superseded by the 2 Will. 2, c. 39, and therefore, in any case, where a defendant does not put in special bail within eight days after the execution of the writ, inclusive of the day of such execution, the plaintiff will be at liberty to proceed on the bail-bond immediately. (*Hillary* v. *Rowles*, T. T. 1833, K. B., 2 D. P. C. 201; S. C. 5 B. & Ad. 460). But where the plaintiff took an assignment of the bail-bond on the 10th, and issued a writ against the bail on the same day, the bond not being forfeited till that day, the writ against the bail was not served till the 11th, the proceedings were set aside on the ground that the action was prematurely brought; the suing out the summons being the commencement of the action. (*Alston* v. *Underhill*, E. T. 1833, Ex., 2 D. P. C. 26). An assignment may be taken after service of

2. *In what Court to be brought*.*

3. *Of the Process†.*

4. *Of staying Proceedings.*

1st.—*Application to stay, when and how made‡.*

2nd.—*Affidavits connected with§.*

3rd.—*Grounds of.*

1. *Irregularities as to putting in Bail‖.*

2. *On account of Render of Principal¶.*

3. *On account of Bankruptcy of Principal**.*

a rule to return the writ; and, formerly, after service of a rule to bring in the body; (7 B. & C. 478); but now, by the Rule H. T. 2 Will. 4, a plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body. (See 7 B. & C. 478; 7 Moore, 600).

* Sheriff may sue on bail-bond in any Court. (*Reg. Gen.*, H. T. 2 Will. 4). But if the assignee sue, the action must be brought in the Court out of which the process issued. (1 Burr. 642; 3 Wils. 348).

† In actions on a bail-bond, the indorsement of debt and costs upon the process should be omitted. (*Rowland* v. *Dakeyne*, T. T. 1834, C. P., 2 D. P. C. 832—S. P. *Smart* v. *Lovick*, M. T. 1834, K. B., 3 D. P. C. 34).

‡ By Rule H. T. 2 Will. 4, if more than one action be brought on the bail-bond, "proceedings may be stayed on payment of the costs in one action, unless sufficient reason be shewn for proceeding in more." However, it has been decided that after verdict in actions on the bail-bond it is too late to stay proceedings in all but one, under Reg. Hil. 2 Will. 4. (*Johnson* v. *M'Donald*, E. T. 1833, Ex., 2 D. P. C. 44).

§ Affidavits in support of motion to stay proceedings on bail-bond may be intituled either in the original action or in the suit against the bail. (*Leyles* v. *Chetwood*, H. T. 1832, Ex., 2 C. & J. 332; S. C. 2 Tyrw. 177—S. P. *Stride* v. *Hill*, H. T. 1836, Ex., 1 M. & W. 37; S. C. 4 D. P. C. 709; 1 T. & G. 459). And the affidavit must swear to a good defence on the merits. (*Hallett* v. *Stone*, H. T. 1833, Ex., 1 D. P. C. 688—S. P. *St. Hanlare* v. *Byam*, 4 B. & C. 970; S. C. 4 D. & R. 458). Since 1 & 2 Vict. c. 110, the Court will stay proceedings on the bail-bond without any affidavit of merits, or driving the bail to the expenses of render. (*Norris* v. *Brachen*, M. T. 1838, C. P., 5 Bing. N. S. 114; 6 Scott, 752, and 7 D. P. C. 144). But where the principal was out of the country, and the bail in no condition to render, the rule was refused. (*Dalton* v. *Gib*, M. T. 1838, C. P., 5 Bing. N. S. 143; 6 Scott, 751; and 7 D. P. C. 143). And when required, a statement that the defendant "has been advised and believes," is sufficient, (*Crossby* v. *Innes*, E. T. 1837, K. B., 5 D. P. C. 566). Although in the Exchequer proceedings stayed on payment of costs after bail put in and perfected, without producing such an affidavit. (*Rourke* v. *Bourne*, M. T. 1833, Ex., 2 D. P. C. 250; S. C. 2 C. & M. 338). The affidavit should shew that application is made at the expense of the bail. (*Rex* v. *The Sheriff of London*, M. T. 1827, C. P., 4 Bing. 427; S. C. 1 M. & P. 177. Semble sufficient since 59 Geo. 3. *Call* v. *Thelwell*, H. T. 1835, Ex., 1 C., M., & R. 780; S. C. 5 T. 231; S. C. 3 D. P. C. 443). And for their indemnity only. (*Key* v. *Mackyntire*, H. T. 1837, Ex., 5 D. P. C. 463). And that it is made without collusion with the defendant. (*Standen* v. *Blake*, H. T. 1824, Ex., 13 Price, 114; S. C. M'Clel. 44). And be made by both bail. (*Dowson* v. *Cull*, T. T. 1832, Ex., 2 C. & J. 671). The Court will make the party pay the costs of unnecessary matters stated in the affidavit, although the motion cannot be resisted. (*Lewis* v. *Woolrych*, E. T. 1835, Ex., 3 D. P. C. 692).

‖ An attorney being one of the bail will not prevent the Court from staying proceedings on the usual terms. (*Mann* v. *Nottage*, E. T. 1827, Ex., 1 Y. & J. 367). But proceedings will not be stayed upon the ground that the affidavit upon which bail had been rejected was false, except upon payment of costs. (*Hobbs* v. *Miller*, E. T. 1827, Ex., 1 Y. & J. 403).

¶ A render is equivalent to perfecting bail above, and therefore proceedings will be staid. (*Hodge* v. *Hopkins*, T. T. 1832, K. B., 1 D. P. C. 431).

** Where the principal became bankrupt, and obtained his certificate within

4. *On account of Death of Principal*.*

5. *On account of Breach of good Faith†.*

4th.—*Terms on which Proceedings will be stayed‡.*

5. *Of setting aside Proceedings§.*

6. *Pleadings in Actions on.*

1st.—*Declaration‖.*

fourteen days after the service of process on his bail:—Held, that they were entitled, under the general regulation, 17th June, 1833, to have proceedings stayed, it having the same operation as an actual surrender. (*Jones* v. *Ellis*, E. T. 1834, K. B., 1 Ad. & E. 382). Where the bail also became bankrupt the bond became forfeited:—Held, entitled to a stay of proceedings, after certificates, notwithstanding the bond had been ordered to stand as a security. If the validity of the commission of the principal be not disputed. (*Streeter* v. *Scott*, H. T. 1834, Ex., 2 D. P. C. 362; 2 Cr. & M. 475; and 4 Tyrw. 372).

* After order to stay on payment of debt and costs, the death of the principal entitles the bail to stay, on payment of costs only. (*Isaac* v. *Rickardo*, M. T. 1838, Ex., 4 M. & W. 382; S. C. 7 D. P. C. 94).

† An affidavit, alleging a breach of good faith, by plaintiff proceeding, after an agreement with the bail, is no ground for staying proceedings. (*Sweeting* v. *Weaver*, H. T. 1824, Ex., 11 Price, 734).

‡ Variances between ac etiam and declaration, not to relieve bail, but bail-bond to stand for 40*l*. (*Reg. Gen.*, H. T. 2 Will. 4).

Attachment not to stand as a security, unless the plaintiff has lost a trial within the term; (*Rex* v. *Sheriff of Middlesex*, 8 D. & R. 137—S. P. *Gale* v. *Hayworth*, H. T. 1837, Q. B., 6 D. P. C. 323—S. P. *Standen* v. *Blakie*, H. T. 1824, Ex., 13 Price, 114; S. C. M'Clel. 44). It lies on the plaintiff to shew that a trial has been lost. (*Rex* v. *The Sheriff of Middlesex*, M. T. 1834, Ex., 3 D. P. C. 194). Loss of a trial in term is the loss of the term. (*Rex* v. *The Sheriff of London*, T. T. 1824, C. P., 2 Bing. 227). And, where there was time to go to trial at the last sitting in term, the Court stayed the proceedings on the bail-bond, allowing it to stand as a security. (*Clark* v. *Vestris*, E. T. 1837, C. P., 4 Sc. 391). This only occurs where, by the defendant's delay in putting in and perfecting bail, judgment of the term cannot be obtained. (*Bevan* v. *Knight*, 1 Tyrw. 421; *Crosby* v. *Davis* and *Smith* v. *Partslow*, 1 Tyrw. 421, n). Preventing plaintiff trying at assizes is losing a trial. (*Fillis* v. *Stabb*, E. T. 1827, Ex., 1 Y. & J. 373). And the Rule H. T. 2 Will. 4, distinctly defines what shall be deemed the loss of a trial. Although a party is not bound to declare de bene esse; yet, if he does not, he cannot say that a trial has been lost, so as to be entitled to have the bail-bond as security. (*Balmont* v. *Morris*, T. T. 1833, Ex., 1 Cr. & M. 661; 3 Tyrw. 821—S. P. *Rex* v. *The Sheriff of Essex*, E. T. 1834, Ex., 2 D. P. C. 648). Although prevented from doing so by the vacation. (*Staines* v. *Stoneham*, M. T. 1835, Ex., 2 Cr., M., & R. 658; 1 Tyrw. & G. 193; and 4 D. P. C. 678). In all cases where bail-bond stands as a security, judgment may be signed. (*Reg. Gen.*, H. T. 2 Will. 4). Proceedings on bail-bond shall be stayed on payment of costs in one action. (*Reg. Gen.*, H. T. 2 Will. 4). But, after verdict, the Court will not stay proceedings in actions on bail-bond, unnecessarily brought against several, under this rule. (*Johnson* v. *Macdonald*, E. T. 1833, Ex., 2 D. P. C. 44). Pending a body rule, the plaintiff took an assignment of the bail-bond and proceeded; but the Court stayed the proceedings, without ordering the bond to stand as a security. (*Ladd* v. *Wilson*, H. T. 1835, Ex., 1 T. 18).

§ Where the process on the bail-bond was sued out after the service of the rule of allowance of bail, the Court set it aside, subject to payment of the costs of the assignment. (*Ellis* v. *Bates*, M. T. 1833, Ex., 2 Cr. & M. 143; 4 Tyrw. 58). Upon motion to set aside a regular bail-bond, if it appear that by the default of the defendant the plaintiff has been prevented from trying his cause, the bail-bond will be allowed to stand as a security. (*Casley* v. *Binns*, H. T. 1837, Ex., 2 M. & W. 285).

‖ A declaration on a bail-bond need not state that the writ issued on an affidavit, and that the sum sworn to was indorsed on the writ. (*Sharpe* v. *Abey*, M. T. 1828, C. P., 5 Bing. 193; S. C. 2 M. & P. 312—S. P. *Dorrington* v. *Bricknell*,

## (*k*) Of cancelling the bail-bond†.

E. T. 1826, C. P., 11 Moore, 445). But it must state, with certainty, the return of the writ on which defendant was arrested. (*Everell* v. *Tunnard*, 2 Chit. Rep. 624). Describing the condition according to legal effect is no variance. (*Shaw* v. *Lee*, 1810, N. P., 3 Stark, 76. See *Baker* v. *Newbegin*, E. T. 1824, K. B., 1 R. & M. 93). So, in an action by the assignee of the bond, it is sufficient to allege the assignment to have been made according to the form of the statute. (*Lewis* v. *Parker*, M. T. 1837, Ex., 6 D. P. C. 93, S. C. 3 M. & W. 133). And where the plaintiff, in his declaration on the bond, described himself as the assignee of the sheriff, the bond being made to himself:—Held, that such description did not vitiate, but might be rejected as surplusage. (*Reynolds* v. *Welsh*, M. T. 1834. Ex., 1 C., M., & R. 580, and 5 Tyrw. 202).

* Bankruptcy may be pleaded by principal when the bail-bond is not ordered to stand as a security, but proceedings only stayed. (*Sainsbury* v. *Gandon*, M. T. 1828, K. B., 3 M. & R. 16. See *Dawson* v. *Levi*, H. T. 1821, K. B., 4 B. & A. 249). The defendant, by his plea, cannot deny the arrest. (*Taylor* v. *Clow*, H. T. 1831, K. B., 1 B. & Ad. 223). Plea, that no proper affidavit was filed; (*Hume* v. *Leversidge*, H. T. 1833, Ex., 1 C. & M. 332); or, generally, that there was no affidavit filed, cannot be sustained. (*Knowles* v. *Stevens*, T. T. 1834, Ex., 1 C., M., & R. 26). At all events, a plea, that no affidavit of debt filed in the action against the principal, should have a conclusion with a verification, or to the country. (*Snow* v. *Stevens*, T. T. 1834, Ex., 2 D. P. C. 664; S. C. 4 Tyrw. 100; S. C. 1 C., M., & R. 26). Where proceedings were taken on the bond before default in the original action:—Held, that it was the subject of plea, and not for setting aside the proceedings as irregular. (*Edwards* v. *Danks*, M. T. 1835, Ex., 1 Tyrw. & G. 229; and 4 D. P. C. 357).

† After payment of debt, and 20*l.*, to cover costs, into Court, the bail-bond will be cancelled. (*Smith* v. *Jordan*, M. T. 1828, C. P., 2 M. & P. 478). So, where an affidavit of debt is insufficient. (*Driver* v. *Hood*, M. T. 1827, K. B., 7 B. & C. 494; S. C. 1 M. & R. 324—S. P. *Vaughan* v. *Goadly*, T. T. 1838, Ex., 6 D. P. C. 96; S. C. 3 M. & W. 143). But, in another case, they refused to set it aside; (*Morgan* v. *Bayliss*, M. T. 1834, C. P., 3 D. P. C. 117); the application must be made before the time for putting in bail has expired. (*Tucker* v. *Colegate*, E. T. 1832, Ex., 2 C. & J. 489; S. C. 2 T. 496; S. C. 1 D. P. C. 574). The affidavit for setting aside the bail-bond, on the ground of the arrest being in a wrong name, must be intituled in the defendant's right name. (*Finch* v. *Cocker*, H. T. 1834, Ex., 2 Cr. & M. 412; 2 D. P. C. 383). But where the affidavit was for goods sold and money lent, and the declaration was on the latter only, the Court refused to cancel the bail-bond. (*Gray* v. *Harvey*, M. T. 1831, K. B., 1 D. P. C. 114). So, bail-bond will not be cancelled on the ground that defendant cannot discover the plaintiff; (*Brown* v. *Moore*, E. T. 1827, C. P., 4 Bing. 148); or, on the ground of the plaintiff having consented to give time which had not expired. (*Udall* v. *Nelson*, E. T. 1835, K. B., 4 N. & M. 637); or where, the defendant, a bankrupt, had obtained his certificate under a third commission, not having paid 15*s.* in the pound under either of the former, the Court refused to cancel the bail-bond given upon arrest, for a debt proveable under the last. (*Summers* v. *Jones*, M. T. 1837, Ex., 6 D. P. C. 139). Nor is perjury in affidavit, in which bail has been rejected, any ground for cancelling bail-bond, except on terms of paying costs. (*Hobbs* v. *Miller*, E. T. 1827, Ex., 1 Y. & J. 403). Bail-bond given by a party who has been discharged from the debt by the Insolvent Act, ordered to be cancelled. (*Norton* v. *Moseley*, M. T. 1826, K. B., 6 B. & C. 106). So, where, after a rule nisi to cancel the bond, the plaintiff offered to consent to a Judge's order to the same effect, costs to be costs in the cause, and no action brought:—Held, that the defendant was entitled to have the bail-bond cancelled. (*Clarke* v. *Crockford*, E. T. 1835, Ex., 3 D. P. C. 693). So, as one bail is bound by the acts of the other, with respect to consent, where, therefore, it was clear that time for putting in special bail had been given with the consent of one, a rule for setting aside the proceedings on the bail-bond discharged. (*Howard* v. *Bradberry*, M. T. 1834, K. B., 3 D. P. C. 92). Where it is doubtful whether the certificate of a bankrupt has been duly obtained, the Court will grant an issue. (*Duncan* v. *Everett*, E. T. 1832, C. P., 1 M. & Scott, 521). A defendant who has been held to bail on an attorney's bill cannot be discharged, because on taxation it is reduced below 20*l.* (*Thwaites* v. *Piper*, H. T. 1824, K. B., 4 D. & R. 194).

SECONDLY—*BAIL TO THE ACTION.*

I. GENERAL NATURE OF*.

II. WAIVER OF RIGHT TO†.

III. NUMBER OF BAIL REQUIRED‡.

IV. WHO MAY, OR MAY NOT, BE BAIL§.

V. OF PUTTING IN, IN TOWN, IN ORDINARY CASES.

(*a*) BY WHOM PUT IN‖.

* If the defendant appears according to the condition of the bail-bond, that exonerates the bail to the sheriff. And that is accomplished by putting in special bail to the action, or bail above, as they are in general denominated, in contradistinction to bail below, or bail to the sheriff. Bail above, or special bail, may be defined to be persons who undertake generally, or in a sum certain, that the defendant, if convicted, shall satisfy the plaintiff, or render himself to proper custody, according to the established practice of the Court in which the recognizance (the security required), shall be taken and recorded. See Peters. on Bail, 266, and 3 Peters. Ab. 97).

† Where the defendant had been arrested on a bill which had been indorsed over by the plaintiff to persons as trustees, and who were ready to give it up for the purposes of suit, the Court held it no waiver of bail. (*Stones* v. *Butt*, H. T. 1834, Ex., 2 C. & M. 416; 2 D. P. C. 335).

‡ More than two bail irregular, without leave of Court or Judge. (Reg. Gen. H. T. 2 Will. 4, S. P. *Anon.*, Ex., 13 Price, 448; For. 138; 2 Bl. Rep. 1122; 1 Chit. Rep. 601).

§ The Court will take judicial notice of unfitness of bail, although unopposed, as, where they have, in a former case, acknowledged their insufficiency. (*Laporte's Bail*, M. T. 1834, C. P., 3 D. P. C. 110). But mere infamy of character is not a ground of rejection: hence, keeping a brothel is no objection. (*Gouge's Bail*, H. T. 1835, K. B., 3 D. P. C. 320). Attorney or his clerk cannot be bail except to render. (*Reg. Gen.*, H. T. 2 Will. 4). And a party told by an attorney that he shall come to no harm, disqualifies him from becoming bail. (*Capon* v. *Dallimore*, M. T. 1824, C. P., 8 Moore, 516; S. C. 1 Bing. 428; S. C. *Anon.*, M. T. 1830, K. B., 1 D. P. C. 1). But becoming bail at request of defendant's attorney, does not disqualify. (*Hunt* v. *Blaquiere*, E. T. 1828, C. P., 4 Bing. 588). The bail must be a housekeeper within the jurisdiction of the Court. (*Hughes* v. *Stirling*, M. T. 1824, Ex., 11 Price, 158). And a person letting out lodgings, though not resident in the house, is deemed a housekeeper, and eligible. (*Cohen* v. *Waterhouse*, T. T. 1824, C. P., 8 Moore, 365). A leaseholder, as such, cannot justify. (*Smith's Bail*, M. T. 1830, K. B., 1 D. P. C. 1). If a party be described in the notice as a housekeeper, and he is only a lodger, though a freeholder, he cannot justify. (*Wilson's Bail*, M. T. 1833, K. B., 2 D. P. C. 431). Nor a party a housekeeper at time of signing bail-piece, but not so at time of justification. (*Weale* v. *Wild*, M. T. 1825, Ex., 12 Price, 770). A person paid for becoming bail is inadmissible. (*Foxall's Bail*, H. T. 1826, K. B., 7 D. & R. 783). A defendant brought up to be charged in execution, cannot be allowed on the same day to justify as bail. (*Bischam* v. *Chambers*, E. T. 1826, C. P., 11 Moore, 343). Having dishonoured bill over due, no excuse assigned, disqualifies. (*Cross* v. *Williams*, M. T. 1830, Ex., 1 Tyrw. 531). It is no objection to bail in an action against the acceptor, that he is the drawer of the bill on which his principal is sued. (*Prime* v. *Beesley*, H. T. 1837, C. P., 3 Bing. N. S. 391; 4 Scott, 37; and 5 D. P. C. 477). But a party being the acceptor of a dishonoured bill not allowed to become bail in an action against the drawer. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 183). A domestic servant of a foreign ambassador held incompetent. (*Lock's Bail*, M. T. 1831, K. B., 1 D. P. C. 124). Where it was sworn, and not contradicted, that the bail were gambling-housekeepers, held to be no objection, they swearing to sufficient property. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 160).

‖ Bail may be put in by the defendant or his attorney, or by an attorney in pursuance of his undertaking, or by the sheriff or his officer. (2 Bing. 271; 5 Price, 558). The sheriff may put in bail for his own protection, and such bail may render without justifying. (*Hamilton* v. *Jones*, T. T. 1830, C. P., 6 Bing.

(*b*) When put in*.

(*c*) Where put in†.

(*d*) Bail-piece‡.

(*e*) Notice of bail, generally§.

639; S. C. 4 M. & P. 454). But bail put in by sheriff's officer before time allowed for that purpose, and without consent of the defendant, set aside. (*Taylor* v. *Evans*, M. T. 1823, C. P., 1 Brod. 367). The bail put in by an attorney describing himself as defendant's attorney, though actually on behalf of the sheriff, is regular. (*Gibbour* v. *Brindley*, M. T. 1825, K. B., 7 D. & R., 259). Before the alterations as to attornies generally practising in the Exchequer, it was holden to be no objection that the bail had been put in by one clerk in Court, and the notice of justification and of added bail by another. If it appear by affidavit that the bail are added, and a notice of justification given by the bail to the sheriff. (*Hancock* v. *Green*, T. T. 1827, Ex., 1 Y. & J. 456). And, if two sets of bail be put in, the plaintiff cannot treat either set as a nullity, but must except to both, if he wishes to prevent their allowance. (*Gibbour* v. *Brindley*, M. T. 1825, K. B., 7 D. & R. 259).

* Bail must be put in on or before the eighth day from the time of the arrest, the day of the arrest being reckoned inclusive. (2 Will. 4, c. 39). When a rule obtained to set aside writ and proceedings is discharged to prevent an assignment of the bail-bond, bail should be put in immediately. (*M. Hanlaire* v. *Byam*, M. T. 1825, K. B., 4 B. & C., 870; S. C., 7 D. & R. 478). The provisions of 2 Will. 4, c. 39, being inconsistent with the rule of Hil. 2 Will. 4, have superseded it, and the language of the act, s. 16, of "putting in bail," is to be taken to mean putting in and giving notice of bail within the time limited. (*Grant* v. *Gross*, H. T. 1835, K. B., 3 D. P. C. 469; 1 Scott, 390). The proviso in 2 Will. 4, c. 39, s. 11, as to vacation, is only applicable to declarations and subsequent pleadings. Where, therefore, the defendant was arrested between 10th August and 24th October; held, that he must put in and justify bail, as in any other part of the vacation. (*Rex* v. *The Sheriff of Middlesex*, M. T. 1834, Ex., 2 C. & M. 399; 4 Tyrw. 68; S. C. 3 D. P. C. 246). Where bail are put in after the regular time has expired, justification is still necessary, before a motion can be made to set aside proceedings. The 4th rule of Trin. 1 Will. 4, applies only to cases where an affidavit is filed, pursuant to the rule. (*Rex* v. *Wilcox*, M. T. 1834, Ex., 3 D. P. C. 255).

† A party arrested upon an alias, or pluries, issued into another county, must put in bail in the county where arrested. (*Reg. Gen.* 1834, C. P., 1b Bing. 344; 3 Scott, 471; same Rule, M. T. 1834, Ex., 2 C. & M. 552; 4 Tyrw. 1; and 2 D. P. C. 397).

‡ The bail-piece must state the county where the arrest took place. (7 T. R. 96). Must be instituted in the Court. (1 Chit. Rep. 79). And should correspond with the writ in the names of the parties, (1 J. B. Moore, 126; 1 M. & S. 199); and the sum indorsed on it. The conditions of the recognizance entered into cannot be varied. (*Bottomley* v. *Medhurst*, E. T. 1824, Ex., 1 M'Clel. 311).

§ In addition to usual places of the bail, the notice must contain the numbers of their houses, and state where the bail have resided the last six months. (*Reg. Gen.*, T. T. 1 Will. 4). Notice of bail must be given in all cases, and bail shall not be allowed to be put in, until notice has been given. (Rule E. T. 46 Geo. 3, C. P.: Rule M. T. 10 Car. 2, K. B.). But where bail have two places of residence it is not necessary to describe them both. (*Portsmouth's Bail*, T. T. 1834, K. B., 2 D. P. C. 541—S. P. *Anon.*, 1 D. P. C. 169). The actual, and not the constructive, reader of the bail must be inserted in the notice. (*Thomas* v. *Smith*, E. T. 1832, K. B., 1 D. P. C. 349). Stating that bail "had within last six months resided," is bad. (*Jameson's Bail*, T. T. 1832, K. B., 1 D. P. C. 486). But a similar notice accompanied by an affidavit, that he had resided there for the last six months, sufficed. (*Ward's Bail*, 1 D. P. C. 596; S. C. 5 Tyrw. 206; 1 C. & M. 24). The notice, it has been held, need not state affirmatively that the bail had resided for the last six months at the places of abode mentioned in the notices. *Littledale*, J., in the King's Bench, had held, that the statement in the notice was independent. (*Fenton* v. *Wiggs*, M. T. 1831, Ex., 2 C. & J. 54: S. C. 2 Tyrw. 156: *Anon.*, 1 D. P. C. 166). Describing a party as resident at a place where his sister sleeps, and where he himself takes refreshment, sufficed. (*Thomson's Bail*, M. T. 1832, K. B.,

## VI. OF PUTTING IN, IN THE COUNTRY*.

## VII. OF PUTTING IN, WITH AFFIDAVIT OF SUFFICIENCY†.

### (*a*) Before whom taken‡.

1 D. P. C. 497). A place well known as a village is a sufficient description, without mentioning a street in it. (*Smith's Bail*, M. T., 1832, K. B., 1 D. P. C. 499). An agent cannot be described in the notice as a gentleman. (*Fleming's Bail*, M. T. 1832, K. B., 1 D. P. C. 641; S. C. 1 C. & M. 111). Nor a clerk as a jeweller. (*Hamlet's Bail*, M. T. 1832, 1 D. P. C. 501). Or, as a gentleman. (*Moss* v. *Heaviside*, H. T. 1826, K. B., 7 D. & R. 772). Or a builder as a gentleman. (*Anon.*, M. T. 1825, C. P., MSS.). Notice of bail need not state where the bail-piece is filed. (*Wigley* v. *Edwards*, M. T. 1833, K. B., 2 D. P. C. 282). The names and descriptions of original or added bail must be inserted in the notice. (*Reg. Gen.*, M. T. 1826, C. P., 6 Bing. 57). A defective notice of bail is not such a nullity as will enable the plaintiff to obtain an attachment. (*Rex* v. *The Sheriff of Middlesex*, E. T. 1833, 2 D. P. C. 5; S. C. 1 C. & M. 482—S. P. *Lowe* v. *Galloway*, T. T. 1814, C. P., 5 Taunt. 663: and see 8 Bing. 334; S. C. 1 M. & S. 518). Omitting to describe the bail as freeholders, or housekeepers, can only be taken advantage of when bail appear to justify. (*Bell* v. *Foster*, E. T. 1832, C. P., 8 Bing. 334; S. C. 1 D. P. C. 271; 1 M. & Scott, 518—S. P. *Wigley* v. *Edwards*, M. T. 1834, Ex., 2 C. & M. 320). A notice describing the party as housekeeper when only a lodger, held insufficient, although it should turn out that he is a freeholder. (*Wilson's Bail*, M. T. 1833, K. B., 2 D. P. C. 432—S. P. *Rex* v. *The Sheriff of Middlesex*, M. T. 1833, K. B., 2 D. P. C. 433). The omission to insert the number of the street in the notice is waived by obtaining time to inquire, unless sworn that bail's residence could not be discovered. (*Foster's Bail*, T. T. 1834, K. B., 2 D. P. C. 586).

* Country bail must be put in on or before the eighth day after the arrest, the day of the arrest being reckoned inclusive. Country bail is put in by affidavit, stating that the bail are housekeepers or freeholders, and worth double the sum sworn to, over and above what will pay all their just debts. (4 Taunt. 704). Such affidavit may be in that form, or according to rule H. T. 1 Will. 4. (See post, Div. *Putting in with Affidavit of Sufficiency*). Country bail is not deemed to be put in until the recognizance is taken, the bail-piece transmitted and filed, and notice given. (*Grant* v. *Gibbs*, 1 Scott, 390; 3 D. P. C. 409). And this must all be done within the time. (*Day* v. *Greenaway*, M. T. 1836, K. B., 5 D. P. C. 243). By rule H. T. 2 Will. 4, "the bail-piece shall be transmitted within eight days, unless the defendant reside more than forty miles from London, and in that case within fifteen days after the taking thereof." But this rule seems repealed by the 2 Will. 4, c. 39, and the bail-piece must, in all cases, be transmitted within eight days. (*Grant* v. *Gibbs*, H. T. 1835, C. P., 1 Scott, 390; 3 D. P. C. 409; *Craig* v. *Evans*, T. T. 1837, K. B., 5 D. P. C. 664). The rule Hil. 2 Will. 4, s. 14, as to the time for transmitting the bail-piece, in the case of country bail, does not affect the time allowed for putting in bail where the assignment of the bond has been taken; and proceedings will only be stayed on payment of costs. (*Day* v. *Greenway*, M. T. 1836, K. B., 5 D. P. C. 243). By rule of M. T. 4 Will. 4, where a defendant is arrested upon an alias, or pluries capias, into another county, pursuant to rule of M. T. 3 Will. 4, the defendant must put in bail in the county where he was arrested. (*Anon.*, M. T. 1831, B. C., 1 D. P. C. 115). Time was allowed to answer the plaintiff's affidavit against bail in a country cause:—Held, that fresh bail could not be put in instead of answering the affidavit, although the time for putting in bail had not expired, nor any attachment issued against the sheriff. (*Cockburn* v. *Ling*, T. T. 1836, C. P., 6 Bing. 732).

† By rule H. T. 1 Will. 4, s. 3, if the notice of bail shall be accompanied by an affidavit of each of the bail (according to the form stated in the rule), and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and, if such bail are rejected, the defendant shall pay the costs of the opposition, unless the Court or a Judge thereof shall otherwise order.

‡ The affidavit should be taken before a Bail Commissioner, and affidavit of caption before a Commissioner for taking affidavits. (*Salmon's Bail*, H. T. 1825, Ex., 1 M'Clel. & Y. 149—S. P. *Anon.*, H. T. 1828, Ex., 2 Y. & J. 101).

(*b*) FORM OF.

1. *Must be in Conformity with the Rule Hilary Term, 1 Will.* 4*.

2. *As to the Name*†.

3. *As to the Addiction*‡.

4. *As to the Residence*§.

5. *As to the Description of Property.*

1st.—*In General*‖.

2nd.—*With Respect to being a Housekeeper*¶.

3rd.—*With Respect to the Words "Possessed," "Worth," &c***.

4th.—*With Respect to the Words "Over and Above," &c*††.

* Affidavit of justification must correspond with the form given in the Rule; equivalent terms cannot be used. (*Okill's Bail*, E. T. 1833, Ex., 2 D. P. C. 19—S. P. *Penson's Bail*, H. T. 1836, 4 D. P. C. 627). And that as to the description of property. (*Weller's Bail*, H. T. 1837, Q. B., 6 D. P. C. 312).

† The jurat must state the names of each bail. (*Wellings* v. *Marsh*, H. T. 1825, Ex., 11 Price, 509). The Court will not give time to correct informalities in the jurat, although occasioned by the error of the Commissioner in the country, without an affidavit of merits. (2 D. & R. 363).

‡ It is necessary to give the defendant some addition: its omission is fatal. (*Benbow's Bail*, T. T. 1837, K. B., 5 D. P. C. 714). Gentleman held a sufficient description of a clerk in the Post-Office. (*Wood* v. *Ray*, T. T. 1834, Ex., 2 D. P. C. 692). So, yeoman is a good description. (*Lanyon's Bail*, M. T. 1834, K. B., 3 D. P. C. 85).

§ The name of the township, or the parish, without naming the street, is sufficient. (*Lanyon's Bail*, M. T. 1834, K. B., 3 D. P. C. 85). As Ely, in the county of Cambridge. (*Hunt's Bail*, M. T. 1835, K. B., 4 D. P. C. 272).

‖ By Rule H. T. 2 Will. 4, "Affidavits of justification shall be deemed insufficient unless they state that each person justifying is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail." If the property described in the affidavit be insufficient, but the bail is proved to be possessed of other sufficient property, he may, upon paying the costs of the opposition, justify. (*Jackson's Bail*, H. T. 1832, K. B., 1 D. P. C. 172—S. P. *Hemming* v. *Blake*, Id. 179).

¶ The affidavit must state the bail to be a housekeeper, and that he resided there (*Heald's Bail*, H. T. 1835, Ex., 3 D. P. C. 423,) for the last six months. (*Welsh* v. *Lywood*, T. T. 1834, C. P., 1 Bing. N. S. 528). Bail allowed to pass when unopposed, though not stated in the affidavit to be a housekeeper. (*Martin* v. *Gell*, M. T. 1832, Ex., 2 Tyrw. 166). And where the residence for six months past has been stated in the notice of bail, it need not be stated again in the affidavit of justification. (*Higgs' Bail*, M. T. 1831, K. B., 1 D. P. C. 124).

** By Rule H. T., 2 Will. 4, supra, affidavits of justification must state that bail is worth the sum required after payment of debts and liabilities, as bail in other actions; and that each party is worth double the sum. (*Perry's Bail*, M. T. 1832, Ex., 1 D. P. C. 606—S. P. *Hutchinson's Bail*, E. T. 1832, Ex., 2 C. & J. 487; S. C. 2 Tyrw. 491—S. P. *Henshaw* v. *Woolwrich*, M. T. 1830, Ex., 1 C. & J. 150). Saying "possessed," instead of "worth," is bad. (*Rogers* v. *Jones*, H. T. 1833, Ex., 1 C. & M. 323; S. C. 1 D. P. C. 704; *Harrison's Bail*, T. T. 1833, 2 Id. 198—S. P. *Simpson's Bail*, M. T. 1832, 1 D. P. C. 605—S. P. *Hutchinson's Bail*, E. T. 1832, Ex., 2 C. & J. 487; 2 Tyrw. 491; S. C. 1 D. P. C. 571). But the statement "he's" for "he is" possessed, or "debts," without saying "book-debts," held sufficient. (*Lanyon's Bail*, M. T. 1834, K. B., 3 D. P. C. 85). And the affidavit, where it states the party to be possessed of money in the funds, must also state in what fund. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 159).

†† By rule H. T. 2 Will. 4, supra, the affidavit must state that the bail is worth property "over and above what will pay his just debts, and over and above

5th.—*Of Furniture and Debts**.

(*c*) NOT BAIL FOR ANY OTHER PERSON†.

(*d*) WHETHER JOINT OR SEVERAL‡.

(*e*) OF ADDED BAIL§.

(*f*) OF DEFECTS IN—EFFECT OF‖.

(*g*) AMENDMENT OF¶.

(*h*) COSTS CONNECTED WITH**.

every other sum for which he is then bail." But it has been held, that if it omits the words "will pay," it is sufficient. (*Edmunds* v. *Keats*, H. T. 1838, Ex., 6 D. P. C. 359. *Housley* v. *Boyd*, E. T. 1835, C. P., 1 Scott, P. 98). Bail are worth the amount required, after payment of all their just debts, suffices. (*Anon.*, H. T. 1828, Ex., 2 Y. & J. 101; *Senior* v. *Speight*, M. T. 1826, Ex., 12 Price, 593—S. P. *Hunt's Bail*, M. T. 1835, B. C., 4 D. P. C. 272).

* Affidavit stating the property to consist of furniture, without stating where, held insufficient. (*Cooper's Bail*, E. T. 1835, Ex., 3 D. P. C. 692). But an affidavit swearing to good debts owing to the bail, omitting the word "book" has been deemed sufficient. (*Lanyon's Bail*, M. T. 1834, B. C., 3 D. P. C. 85. See *Okill's Bail*, 2 D. P. C. 19).

† Stating not bail for "any," omitting "person," suffices. (*Smith's Bail*, M. T. 1832, K. B., 1 D. P. C. 514).

‡ The affidavit of sufficiency in country bail, under the new rules of Trin. 1 Will. 4, may be joint, although the form prescribed is several, and although its form purports to be according to the old rules it is sufficient. (*Anon.*, M. T. 1831, K. B., 1 D. P. C. 115).

§ Where bail, of whom notice has been given, are rejected, new bail cannot be put in without leave of a Judge or the Court. (*Jones* v. *Vestris*, E. T. 1837, C. P., 3 Bing. N. S. 677; 4 Scott, 394; 5 D. P. C. 622).

‖ Where the affidavit stated the amount of the debt less than the sum indorsed on the writ, the bail-bond ordered to be cancelled, and a common appearance entered. (*Cook* v. *Cooper*, M. T. 1838, K. B., 2 N. & P. 607, and 7 Ad. & E. 605). Where bail, not being able at the time to answer as to his debts and credits, was disallowed but not rejected, he was allowed to justify on coming again prepared to answer sufficiently. (*Clarke* v. *Vestris*, E. T. 1837, C. P. 4 Scott, 391). And though the affidavit of sufficiency is insufficient, the bail may, upon payment of costs, justify. (*Shane* v. *Spode*, M. T. 1836, Ex., 2 M. & W. 42).

¶ In general the affidavit cannot be amended. (*Worlison's Bail*, E. T. 1883, Ex., 2 D. P. C. 53). But the word "householders" for "housekeepers" may be corrected. (*Anon.*, M. T. 1831, K. B., 1 D. P. C. 127). So, if the addition be omitted. (*Brown's Bail*, M. T. 1836, K. B., 5 D. P. C. 220). Or the affidavit state that the bail were not security for any defendant, except the above defendant, allowed to be amended by adding, "except in this action." (*Warren* v. *De Burgh*, M. T. 1838, C. P., 7 D. P. C. 96).

** Costs of opposition refused where the affidavit omitted to describe the bail as housekeepers or freeholders. (*Kibble* v. *Thorburn*, M. T. 1832, C. P., 2 M. & Scott, 359). And costs not allowed where, although the bail justified, the affidavit only stated the bail to be possessed of sufficient property. (*Thompson's Bail*, E. T. 1833, Ex., 2 D. P. C. 50). And the Court refused the costs of justifying where the affidavit of sufficiency, as to furniture and debts, omitted to specify either the value or place where to be found. (*Hodgson* v. *Cooper*, E. T. 1835, Ex., 2 C., M., & R. 43). But where the bail are sufficient, but the property is misdescribed in the affidavit, they will be admitted without payment of costs, and those of opposition will be costs in the cause. (*Brown* v. *Ahrenfeldt*, M. T. 1838, Ex., 4 M. & W. 76; S. C. 7 D. P. C. 46). However, if a correct affidavit be afterwards produced, the defendant held entitled neither to receive nor pay costs. (*Popjoy's Bail*, M. T. 1834, Ex., 1 C., M., & R. 594; 3 D. P. C. 170, S. C. 5 Tyrw. 196). Where a satisfactory affidavit was produced to explain a charge supposed to exist on the property specified, held, that the defendant was entitled to costs, the rule of Trin. 1 Will. 4, applying to country as well as to town bail. (*Grant's Bail*,

VIII. ACCEPTING OF*.

IX. EXCEPTING TO†.

X. ADDING TO, OR CHANGING BAIL‡.

XI. JUSTIFYING, IN TOWN, IN ORDINARY CASES.

(*a*) WITHIN WHAT TIME, AND WHEN§.

M. T. 1834, Ex., 1 C., M., & R. 598, 3 D. P. C. 165; and 5 Tyrw. 227). In order to obtain the costs, under 3 Reg. of Trin. 1 Will. 4, the application must be made at the time of justifying. (*Fream* v. *Best*, E. T. 1834, K. B., 2 D. P. C. 590).

* If bail be not excepted to within twenty days after notice of bail they are considered as accepted, without justification. (Rule M. T. 8 Anne, K. B.).

† The exception must be entered within twenty days after notice. (Rule M. T. 8 Anne). By Rule H. T. 2 Will. 4, taking an assignment of the bail-bond does not preclude the plaintiff from excepting to the same bail. The exception must be entered, as well as notice given. (*Rex* v. *The Sheriff of Middlesex*, E. T. 1826, K. B., 5 B. & C. 389; S. C. 8 D. & R. 137—140; S. C. *Thwaites* v. *Glassington*, E. T. 1824, K. B., 4 D. & R. 365. See *Hodson* v. *Garratt*, 1 Chit. Rep. 174). Nor will notice of justification dispense with notice of exception so as to authorize proceedings against the sheriff. (*Rex* v. *The Sheriff of Middlesex*, E. T. 1826, K. B., 5 B. & C. 389; S. C. 8 D. & R. 149). It is sufficient for the plaintiff to except to one of the bail to compel the justification of both, and the defendant cannot treat the exception as a nullity. (*Feltham* v. *King*, T. T. 1837, K. B., 5 D. P. C. 658). Rule to bring in the body cannot be served before excepting to the bail, sed qu. (*Rex* v. *The Sheriff of Middlesex*, M. T. 1825, K. B., 7 D. & R. 264. See 8 T. R. 258).

‡ Bail not to be changed without leave of the Court or a Judge. (By *Reg. Gen.* T. T. 1 Will. 4). And this rule applies to the case of bail substituted by the sheriff for the purpose of rendering. (*Rex* v. *The Sheriff of Essex*, H. T. 1834, C. P., 4 M. & Sc. 247). Where persons become bail without any pretence for supposing they can justify, no time will be given to add other bail. (*Anon.*, Ex., 10 Price, 8). So, where bail attempted to justify, and were rejected on a preliminary technical objection, the Court refused to allow fresh bail to be added. (*Elliott* v. *Gutteridge*, H. T. 1838, Q. B., 6 D. P. C. 255). And, where the bail were not excepted to, but afterwards discovered to be insolvent, the Court refused an application to compel the defendant to add and justify others. (*Lazarus* v. *Levaux*, M. T. 1835, 4 D. P. C. 353). And to obtain permission, a reason must be given in the affidavit why competent bail was not put in, in the first instance. (*Orchard* v. *Glover*, M. T. 1832, C. P., 9 Bing. 318; S. C. 2 M. & Scott, 396; S. C. 1 D. P. C. 707). Where new bail is put in the Court will grant time for inquiry, but will not give costs of opposition. (*Bowman* v. *Russell*, M. T. 1832, Ex., 3 Tyrw. 747). Where the description of bail is so vague that they are rejected, but time is given, the question of costs will be reserved until the justification. (*Richardson* v. *Hodgson*, H. T. 1825, Ex., 11 Price, 379).

§ The bail must justify, or defendant render, within four days after exception; but where the sheriff has been ordered to bring in the body, the defendant has the same time to justify, or render, as the sheriff has to bring in the body. (*Whittle* v. *Oldaker*, M. T. 1827, K. B., 7 B. & C. 478; S. C. 1 M. & R. 298. Semb. over-ruling *Bond* v. *Evans*, M. T. 1825, K. B., 4 B. & C. 864; S. C. 7 D. & R. 374). Even though put in sooner than necessary, must nevertheless justify within four days from exception. (*Bond* v. *Evans*, M. T. 1825, K. B., 4 B. & C. 864; S. C. 7 D. & R. 374). A defendant arrested between the 10th August and 24th October, must justify, as well as put in bail, or the plaintiff may proceed against the sheriff or on the bail-bond. (*The King* v. *The Sheriff of Middlesex*, M. T. 1833, Ex., 2 D. P. C. 286; S. C. 2 C. & M. 333). And bail excepted to in vacation must justify in term, unless required by notice to justify at Chambers. (*Reg. Gen.* H. T. 2 Will. 4). When bail changed by Judge's order, they cannot justify until payment of the costs of the order. (*Jourdain* v. *Gunn*, T. T. 1831, Ex., 2 Tyrw. 491). Where time for justifying expires on a dies non, the bail may be permitted to justify on following day. (*Pratt* v. *Oddy*, H. T. 1825, C. P., 2 Bing. 440). In Exchequer, after a successful opposition, a deposit for costs must be made before new bail can justify. (*Smith* v. *Cooper*, E. T. 1831, Ex.,

(*b*) NOTICE OF JUSTIFICATION OF.

1. *How intituled**.
2. *Number of Bail to be named in*†.
3. *Bail how to be described in*‡.
4. *Defendant, how to be described in*§.
5. *Need not state Mode of Justification*‖.
6. *By whom to be given*¶.
7. *When it must be given, and for what Time***.

1 C. & J. 460; S. C. 1 Tyrw. 378). It is too late after the bail are sworn to require that the costs of former unsuccessful attempts to justify should be paid or deposited. (*Knight's Bail*, M. T. 1835, C. P., 4 D. P. C. 328). Where bail at first were successfully opposed, but afterwards admitted, held, that the plaintiff was entitled to the costs of the former opposition, although not asked for at the time. (*Lewis* v. *Glossop*, M. T. 1835, Ex., 2 C., M., & R. 655, and 1 Tyrw. & G. 190). The rule as to deposit for costs applies to country as well as town bail; an affidavit alleging previous rejection at Chambers, but not stating for insufficiency, held, not a ground for rejection. (*Goodricke* v. *Turley*, M. T. 1835, Ex., 1 Tyrw. & G. 219, S. C., 4 D. P. C. 392).

* The notice should be intituled in the cause. (Lofft. Rep. 237).

† Two persons should be stated as bail in the notice. And the defendant cannot justify one bail without consent of the plaintiff. (*White's Bail*, T. T. 1836, K. B., 5 D. P. C. 133).

‡ The notice of bail must state where the bail have resided for the last six months. (*Beal's Bail*, E. T. 1835, Ex., 3 D. P. C. 708; S. P. *Holling's Bail*, M. T. 1831, K. B., 5 D. P. C. 220). But need not go on to state that he has resided there during that period. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 160). And, where the bail had two places of residence during the whole of the last six months, the notice need only describe one. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 159). But describing the bail as of a parish merely, is insufficient. (*Treasure's Bail*, T. T. 1834, Ex., 2 D. P. C. 670). The notice of bail must state the bail to be housekeepers or freeholders, as that fact cannot be shewn by an accompanying affidavit. (*West* v. *Williams*, H. T. 1832, K. B., 1 D. P. C. 162—S. P. *Beale's Bail*, E. T. 1835, Ex., 3 D. P. C. 708). And, where the notice of bail omitted to state that the bail were housekeepers or freeholders, although they ultimately justified, held, the defendant was not entitled to costs of justification. (*Anon.*, M T. 1831, K. B., 1 D. P. C. 126).

§ Notice being that bail would justify for three defendants does not prevent their justifying for two defendants. (*Denton and Others' Bail*, M. T. 1830, K. B., 1 D. P. C. 2). Describing defendants in the single number in notice of justification, does not vitiate it. (*Anon.*, E. T. 1831, Ex., 1 Tyrw. 378).

‖ The notice of justification of town bail need not state whether they will justify in person or by affidavit. (*Norton's Bail*, T. T. 1836, Ex., 1 M. & W. 632; 1 Tyrw. & G. 847, and 5 D. P. C. 85).

¶ The notice must be given in the name of the attorney, authorizing his name to be used, and not of the party using it, when not an attorney of the Court. (*Chadwick* v. *Hough*, E. T. 1835, Ex., 2 C., M., & R. 164—S. P. *Marden's Bail*, E. T. 1835, Ex., 3 D. P. C. 654). And where A., the attorney giving the notice, was not one of the Court, and the notice was signed Alex. B., in whose name he had liberty to practise, held irregular. (*Chadwick* v. *Hough*, E. T. 1835, Ex., 2 C., M., & R. 29).

** Two days' notice of justification suffices in all cases, (*Reg. Gen.* H. T. 2 Will. 4). Where the same bail justify at Chambers, one day's notice is sufficient. (*Wilson* v. *Hawkins*, H. T. 1336, K. B., 5 D. P. C. 436). The days between Thursday and Wednesday after Easter are not to be reckoned in notices of justification of bail. (*Cumming* v. *Pullen*, E. T. 1835, C. P., 1 Scott, 538). Bail must, in Exchequer, be in attendance at half-past nine o'clock in the morning. (*Reg. Gen.* E. T. 1823, Ex., 9 Price, 517). Where the notice was to justify at eleven o'clock instead of ten, held, cured by the appearance of the parties. (*Beal's Bail*, E. T. 1835, Ex., 3 D. P. C. 708).

8. *Effect of**.

9. *Where to justify*†.

10. *Errors in, how waived*‡.

11. *Of added Bail*§.

12. *Granting further Time, and justifying conditionally*‖.

13. *Of Costs of justifying, and where Intimidation has been used.*

See also ante, Div. VIII., p. 558 (*a*) ¶.

* Notice of justification is a waiver of the want of entry of the notice of exception: but the omission of the allegation that the bail had resided for the last six months at the place of which they were described, is fatal. (*Hanwell's Bail*, H. T. 1835, Ex., 3 D. P. C. 425).

† Bail may justify at Chambers, (11 Geo. 4 & 1 Will. 4, c. 70, s. 12), in term or vacation, annulling 17 Reg. Hil. 2 Will. 4, Reg. Gen. H. T. 1838, 4 Bing. N. S. 366; S. R. 3 M. & W. 154—S. R. 3 N. & P. 1). Notice of justification at Chambers must insert the hour, but the omission does not entitle the plaintiff to treat it as a nullity, and commence proceedings on the bail-bond before the time for justifying has expired. (*Smith* v. *Wells*, T. T. 1837, Ex., 2 M. & W. 879). The Chief and one Judge of any Court empowered to authorize commissioners not being attornies to take bail recognizances, and the cognizors or bail may justify before such commissioners, by 1 & 2 Vict. c. 45, s. 4).

‡ A party misnamed in notice, and sworn by the wrong name, may still justify on proving that he has sufficient property. (*Levi's Bail*, M. T. 1826, C. P., 7 Moore, 282).

§ The Rule of Trin. 1 Will. 4, s. 1, requiring four days' notice of justification, does not apply to added bail. (*Key* v. *M'Intyre*, H. T. 1837, Ex., 2 M. & W. 336; 5 D. P. C. 453, 463).

‖ Time to justify and add a new bail can only be obtained where the bail is prevented from justifying by act of God. (*Watson's Bail*, C. P., 8 Moore, 208). The effect of a Judge's order for time to put in bail is, that within that time the bail shall be put in, transmitted, and filed, notwithstanding the Rule 1, Hil. 2 Will. 4, s. 14. (*Craig* v. *Evans*, T. T. 1837, K. B., 5 D. P. C. 664). But, time given to put in and justify, where real doubt exists as to whether defendant was properly holden to bail. (*Cope* v. *Joseph*, E. T. 1820, Ex., 9 Price, 155). Where it appeared that the plaintiff could not, under the circumstances, possibly have inquired into the sufficiency of the bail, time allowed on payment of costs. (*Dicas* v. *Smith*, M. T. 1836, C. P., 5 Scott, 600). When bail are obviously incompetent time will be refused. (*Anon.*, 1820, Ex., 8 Price, 8). The Court will give time to justify at Chambers. (*Bell* v. *Horton*, E. T. 1825, Ex., 11 Price, 741). And, in general, if bail be not in attendance, the Judge will grant time on condition that an affidavit is produced to him at Chambers, giving a satisfactory reason for his absence. When an application for time is rendered necessary by the negligence of the attorney, he will be ordered to pay the costs. (*Shillitoe's Bail*, H. T. 1823, K. B., 9 D. & R. 6). On terms of paying costs, time given to put in other bail, on ground that agent had not had time to procure proper bail. (*Whitehead* v. *Minn*, M. T. 1831, Ex., 2 C. & J. 54; S. C. 2 Tyrw. 160). If plaintiff lose a trial when further time is given to justify, an attachment may be obtained. (*Rex* v. *The Sheriff of Middesex*, K. B., 8 D. & R. 137). Bail, stating they had money at a particular place, allowed to justify conditionally. (*Anon.* M. T. 1831, Ex., 2 Tyrw. 158). Where time is given to obtain new bail, demanding plea does not waive the justification. *Rex* v. *The Sheriff of Middlesex*, T. T. 1818, K. B., 4 D. & R. 834).

¶ The expenses of inquiring into the competency of the bail, allowed to be costs in the cause. (*Paine* v. *Munton*, H. T. 1833, Ex., 2 Tyrw. 162). Omitting No. of house entitles plaintiff to time to make inquiries, or to have costs of affidavit, and appearing to oppose. (*Muir* v. *Smith*, M. T. 1834, Ex., 3 Tyrw. 742). If bail be intimidated by the plaintiff from justifying, he will have to pay the costs of substituting others. (*Gwynne* v. *Fuller*, T. T. 1832, B. C., 1 D. P. C. 444).

## XII. JUSTIFYING, IN THE COUNTRY*.

## XIII. JUSTIFYING, AND NOTICE THEREOF—WHERE BAIL ARE PUT IN, AND JUSTIFY AT THE SAME TIME, UNDER RULE T. T. 1 Will. 4†.

## XIV. BAIL IN CASE OF PRISONERS‡.

* An affidavit of justification by country bail, purporting to be according to the Rule H. T. 1 Will. 4, and H. T. 2 Will. 4, but not containing all the requisites, is good, if it be according to the form adopted before those rules. See 1 Arch. Prac. K. B., 244, 6th ed. If the bail be excepted to, which must be within twenty days, Rule M. T. 8 Anne, they must justify, and two days' notice of justification seems sufficient. (*Harbottle* v. *Clark*, T. T. 1835, B. C., 4 D. P. C. 12). Country bail may justify either in open Court, before a Judge at Chambers, or by affidavit, Rule 8 Will. 3. If they reside in London or Middlesex, or within ten miles thereof, they must justify in Court, or at a Judge's Chambers, but, if they reside above ten miles, they may justify by affidavit, 4 W. & M. c. 4, s. 2. (See, as to the affidavit, costs, &c. Div. VII. *Putting in, with Affidavit of Sufficiency*, ante, p. 556.

† On giving four days' notice before eleven o'clock in the morning, bail may be put in, and justify at the same time. Further time to inquire into competency may be obtained. (*Reg. Gen.* T. T. 1 Will. 4, s. 1). Though affidavit given in rule is several, it may be joint. (*Anon.*, M. T. 1831, B. C., 1 D. P. C. 115). The affidavit must state where the property is. (*Anon.*, H. T. 1832, K. B., 1 D. P. C. 159). Four days' notice mentioned in the rule is only required where bail are put in and justify at same time. (*Jones's Bail*, E. T. 1833, K. B., 2 D. P. C. 159). The Rule T. T. 1 Will. 4, does not apply to bail changed by leave of the Court or a Judge. (*Perry's Bail*, E. T. 1832, Ex., 2 C. & J. 475; S. C. 1 D. P. C. 564). Nor does this part of the rule, which enables the recognizance to be taken out of Court, apply where the defendant is bound to justify without exception. (*Webb's Bail*, T. T. 1832, K. B., 1 D. P. C. 446). It applies to country as well as town bail. (*Anon.*, T. T. 1834, C. P., 6 M. & P. 297). Notice of putting in and justifying bail at same time, must be four days, exclusive of Sunday, and served before eleven o'clock. (*Jenkins* v. *Maltby*, M. T. 1831, Ex., 2 C. & J. 124). Where an affidavit of justification is made with the intent of putting in and justifying bail at the same time, if notice of justification be not given, the plaintiff has twenty days to except. (*Goddard* v. *Jarvis*, T. T. 1832, C. P., 9 Bing. 88). Where bail justify according to Rule T. T. 1 Will. 4, the defendant is entitled to costs if they appear on exception, and the plaintiff does not attend to oppose. (*Johnson's Bail*, M. T. 1832, K. B., 1 D. P. C. 514). The copy of affidavit of sufficiency served on the plaintiff must refer to the original, and state when filed and purport to be a copy. (*West* v. *Williams*, H. T. 1832, K. B., 3 B. & Ad. 345). Where the affidavit is that bail are "possessed," and the plaintiff fail in his opposition to the bail, costs will not be given to the defendant. (*Thompson's Bail*, E. T. 1833, Ex., 2 D. P. C. 50).

‡ A prisoner may put in and justify bail upon a two days' notice, as prior to the new rule. (*Davies* v. *Grey*, H. T. 1832, Ex., 2 C. & J. 309; S. C. 2 Tyrw. 277). Notice signed by a prisoner as being in custody suffices. (*Frith's Bail*, M. T. 1833, Ex., 2 D. P. C. 229—S. P. *Poole's Bail*, H. T. 1837, Ex., 2 M. & W. 312; 5 D. P. C. 449). But must state that fact accordingly. (*Creighton's Bail*, H. T. 1833, Ex., 1 C. & M. 335; S. C. 1 D. P. C. 609—S. P. *Fuller's Bail*, M. T. 1834, 5 Tyrw. 491). Though, if signed by the defendant in custody, it is sufficient without stating that he was a prisoner. (*Frith's Bail*, M. T. 1833, Ex., 2 D. P. C. 229). The four days' notice as to putting in and justifying at the same time, under Rule T. T. 1 Will. 4, does not apply to a prisoner. (*King's Bail*, M. T. 1832, 1 D. P. C. 509—S. P. *Davis* v. *Grey*, H. T. 1832, Ex., 2 C. & J. 309; *Preston's Bail*, E. T. 1832, K. B., MS. Jervis's Rules). When one of two bail justify for a prisoner, time for justifying will be granted. (*Foy's Bail*, H. T. 1834, K. B., 2 D. P. C. 442). Bail in favour of a prisoner may be changed without leave of the Court or a Judge. (*Bird's Bail*, T. T. 1834, K. B., 2 D. P. C. 583; *Stroud* v. *Kenny*, E. T. 1832, MS. Jervis's Rules, 28, 3rd Ed.—contra by *Taunton*, J.) After bail put in before the filacer, added bail may be taken before a commissioner in the country. (*Moore* v. *Kenrick*, T. T. 1826, C. P., 3 Bing, 603). A defendant not in custody cannot justify at Chambers in vacation, unless re-

XV. OPPOSING*.

XVI. ALLOWANCE†.

XVII. LIABILITY OF‡.

XVIII. OF THE PROCEEDINGS PREPARATORY TO SUING THE BAIL§.

quired to do so by the plaintiff. (*Barratt* v. *James*, T. T. 1836, K. B., 5 D. P. C. 123). On bail coming up to justify a second time, the costs of the former attempt must be paid or deposited, and the defendant being a prisoner makes no difference. (*Pasmore's Bail*, M. T. 1834, Ex., 3 D. P. C. 214).

* Affidavits produced in opposition to those in justification cannot be met by counter affidavits. (*Alpin* v. *Fox*, M. T. 1823, C. P., 5 Moore, 482). Justification cannot be opposed because costs of proceedings on bail-bond have not been paid. (*Wilson's Bail*, M. T. 1832, Ex., 1 D. P. C. 614). If brief be given to counsel to oppose bail, and they do not appear, but appear on a second notice, the plaintiff is entitled to the costs incurred by the latter. (*Barrow* v. *Whitehead*, M. T. 1827, Ex., 2 Y. & J. 2. See 1 Taunt. 58, n.). The plaintiff may waive opposition and have the costs. (*Innis* v. *Smith*, T. T. 1832, Ex., 2 C. & J. 634). Gross prevarication of bail as to his property is a ground for sending him to Newgate. (*Wilson* v. *Bodkin*, M. T. 1823, K. B., 8 D. & R. 41). To affect the principal a participation in the misconduct of the bail must be brought home to him. (*Berling* v. *Waters*, T. T. 1827, C. P., 6 Bing. 423).

† As soon as the bail justify, the rule for the allowance should be drawn up and served. A misdescription by the bail of their place of residence is no ground for setting aside the allowance. (*Eaglefield* v. *Stephens*, M. T. 1833, K. B., 2 D. P. C. 438). On the application of bail above the Court will not set aside an attachment obtained against the sheriff because no rule for allowance had been served. (*Rex* v. *The Sheriff of Middlesex*, T. T. 1833, Ex., 2 D. P. C. 116). Where notice of allowance of added bail had been served on the plaintiffs, but a rule afterwards obtained to discharge such allowance, and an attachment issued against the sheriff, but in the mean time, and whilst the original, as well as the added bail, appeared on the recognizance, the defendant was rendered generally in discharge of his bail:—Held, that the second bail having become a nullity, and the original bail liable up to the time of the justification of the second, they remained capable of rendering the defendant. (*Rex* v. *The Sheriff of Middlesex*, H. T. 1827, C. P., 6 Bing. 251).

‡ Bail only liable to sum sworn to, and costs not exceeding amount of recognizance. (*Reg. Gen.* H. T. 2 Will. 4. See *Blaney* v. *Holt*, 3 N. & M. 531). And the two bail are not liable beyond the sum specified. (*Vandansau* v. *Nash*, T. T. 1829, C. P., 10 Bing. 329; S. C. 3 M. & Scott, 834). And, before Rule H. T. 2 Will. 4, bail, in actions by bill in King's Bench, were only liable to double sum sworn to, and costs. (*Blaney* v. *Holt*, T. T. 1833, K. B., 5 B. & Ad. 241). Bail are liable on their recognizance for the residue left unsatisfied after the plaintiff has proceeded against the goods of the principal by fi. fa. (*Stevenson* v. *Roche*, T. T. 1829, K. B., 9 B. & C. 707). While the names of bail continue on the bail-piece, they are liable, though rejected. (*Sayer* v. *Verdenhulm*, H. T. 1819, K. B., 6 M. & Selw. 218). But, where after bail put in, the declaration was amended by adding new counts on other causes of action, and the plaintiff recovered on all:—Held, that the bail were not liable to the costs on the added counts, and that the onus of separating the liability on taxation lay on the plaintiff. (*Taylor* v. *Wilkinson*, H. T. 1838, K. B., 1 N. & P. 629). Where, prior to the new rules of Hil. 2 Will. 4, the action against the original defendant was by bill, and an action had been brought on the recognizance against the bail, the Court stayed the proceedings against the latter, on payment of double the sum sworn to, and costs of the action against the bail. (*Rex* v. *Holt and Another*, T. T. 1824, K. B., 5 B. & Ad. 241).

§ Where the defendant consented to give judgment as of a term previous to the trial:—Held, that the ca. sa. against the bail was properly tested of that term. (*Hovenden* v. *Crawther*, H. T. 1832, K. B., 1 D. P. C. 170). But, as regards the bail, the Judge has no power to make a writ returnable at a special day, of which the bail have no means of informing themselves. (*Kemp* v. *Hyslop*, H. T. 1836, Ex., 4 D. P. C. 687). Ca. sa. to fix bail to be entered

## XIX. OF THE PROCEEDINGS AGAINST BAIL ON THEIR RECOGNIZANCE.

(*a*) By action*.

(*b*) By sci. fa.†

four days in the public book at sheriff's office. (*Reg. Gen.* H. T. 2 Will. 4). This was not requisite prior to the rule in the Exchequer. (*Smith* v. *Porter*, T. T. 1825,, 1 M'Clel. & Y. 431). The ca. sa. must remain in the office four entire days before the return day, exclusive of the day when it is lodged, and of the return day. (*Furnell* v. *Smith*, M. T. 1827, K. B., 7 B. & C. 693). And Sunday is not reckoned as one of those days. (*Howard* v. *Smith*, K. B., T. T. 1825, 1 B. & Ad. 228). Or Holy Thursday. (*Scott* v. *Larkin*, M. T. 1830, C. P., 7 Bing. 109). But half holidays are to be reckoned. (*Armitage* v. *Ryley*, H. T. 1835, 5 Ad. & E. 76). Procuring a ca. sa. against the principal to be returned non est, knowing that he is in custody, vitiates the proceedings against the bail. (*Briggs* v. *Richardson*, E. T. 1833, K. B., 2 D. P. C. 158). Bail can only take advantage of the writ of ca. sa. against their principal by pleading it. (*Philpot* v. *Manuel*, H. T. 1826, K. B., 5 D. & R. 615). But irregularities in the ca. sa. against the principal may be objected to by motion, as well as by plea, in proceedings under the sci. fa. against bail. (*Goldney* v. *Laporte*, H. T. 1836, C. P., 2 Bing. N. S. 456, 4 D. P. C. 639, and 2 Scott, 670). A misdescription of the form of action in the writ of ca. sa. is only an irregularity, and does not make it void, and is not such an objection as may be taken advantage of by bail. (*Gurney* v. *Hopkinson*, M. T. 1834, 1 C., M., & R. 587; 5 Tyrw. 211; S. C. 3 D. P. C. 189). It is no ground for setting aside the ca. sa. in the original action, or subsequent proceedings against the bail, that the damages and costs recovered exceed the damages laid in the declaration. (*Kempeneers* v. *Holding*, 5 D. P. C. 374). If the plaintiff knows of the defendant being in the sheriff's custody under a different name, and obtains a return of non est inventus, in order to fix the bail, the Court will set aside the proceedings as irregular. (*Briggs* v. *Richardson*, E. T. 1833, B. C.,, 2 D. P. C. 158). Where the ca. sa. was lodged on 24th October, and proceedings commenced against the bail on 3rd November:—Held, that it was too late to move to set aside the proceedings for irregularity on the 13th November. (*Pocock* v. *Cockerton*, M. T. 1838, Ex., 7 D. P. C. 21). Where, after the ca. sa. had been returned non est inventus, the defendant obtained a rule nisi for a new trial, with a stay of proceedings:—Held, that, on the discharge of the rule, the right to issue the sci. fa., which had been only suspended, revived, and that no fresh entry of judgment, or alias ca. sa., was necessary. (*Armitage* v. *Ryley*, T. T. 1836, K. B., 5 Ad. & E. 76).

* Writ of summons cannot be sued out against the bail to the sheriff the same day as the time for putting in bail expires. (*Alston* v. *Underhill*, E. T. 1833, Ex., 1 C. & M. 492; S. C. 2 D. P. C. 26). In debt on a bail recognizance it is not necessary to allege in the declaration the certificate for immediate execution, under 1 Will. 4, c. 7, s. 2, as the Court will take notice that a judgment may not be signed in vacation; but the judgment must be stated to be of the day when actually obtained, and not of the previous term, and must appear to be upon a finding of a jury. (*Engleheart* v. *Eyre*, K. B., 2 N. & M. 849).

† When recorded in Middlesex to be brought in that county only. (*Reg. Gen.* H. T. 2 Will. 4). And cannot be quashed, after appearance, without costs. (*Reg. Gen.* H. T. 2 Will. 4). Which is effected by a notice in writing to plaintiff. (*Reg. Gen.* H. T. 2 Will. 4). No judgment to be signed in sci. fa. without leave. (*Reg. Gen.* H. T. 2 Will. 4). The service of a sci. fa. in the evening before the return day, regular. (*Lewis* v. *Pine*, T. T. 1833, K. B., 2 D. P. C. 133). Before the Rule H. T. 2 Will. 4, actual notice need not have been given to bail of the sci. fa. (*Smith* v. *Crane*, H. T. 1826, C. P., 7 Moore, 8). But even before that rule the Court would set aside proceedings against bail by sci. fa., where the attorney had expressed fear that they would have notice of them. (*Wilson* v. *Biden*, M. T. 1824, C. P., 4 M. & P. 537). But now, judgment cannot be signed on sci. fa., unless bail have had notice of proceedings. (*Higgins* v. *Wilkes*, T. T. 1832, K. B., 1 D. P. C. 447). However, after eight o'clock in the evening before the return day is sufficient, and even at any time before the rising of the Court on the return day suffices. (*Lewis* v. *Pine*, T. T. 1833, Ex., 1 C. & M. 771; S. C. 3 Tyrw. 867; S. C. 2 D. P. C. 133 (overruling *Webb* v. *Harvey*, 2 T. R. 757). And bail residing out of Middlesex must either have actual

## XX. DISCHARGE OF.

### (*a*) By render.

1. *By whom and in what manner**.
2. *Within what Time*†.
3. *To what Prison*‡.
4. *Of the Notice of*§.
5. *How long the Right continues*‖.
6. *Effect of*¶.
7. *Enlargement of Time to render***.

notice, or attempts to give notice thereof. (*Wimall* v. *Cook*, T. T. 1833, B. C., 2 D. P. C. 173—S. P. *Newton* v. *Maxwell*, T. T. 1832, Ex., 2 C. & J. 635). But, it is not necessary, although usual, that the sci. fa. should be tested on the return of the ca. sa., nor need the four days in which the sci. fa. must lie in the office be in term. (*Sandland* v. *Claridge*, T. T. 1833, Ex., 1 C. & M. 672; 3 Tyrw. 804; 2 D. P. C. 115). But are to be exclusive of Sunday. (*Fraser* v. *Miller*, M. T. 1831, K. B., 1 D. P. C. 141—S. P. *Anon.*, M. T. 1831, B. C., 1 D. P. C. 142). Alias sci. fa. may be tested on the return day of the first, and it suffices if there be five days between teste of first writ and return of the second. (*Combe* v. *Cuttell*, T. T. 1825, C. P., 3 Bing. 210; S. C. 10 Moore, 534). To a sci. fa. against bail, a mere irregularity in the proceedings cannot be pleaded. (*Sandon* v. *Proctor*, H. T., 1828, K. B., 7 B. & C. 800). A sci. fa. against two is a joint proceeding, though separate executions may issue. (*Sainsbury* v. *Pringle*, E. T. 1830, K. B., 10 B. & C. 751).

* Bail rejected may render. (*Reg. Gen.* H. T. 2 Will. 4). In fact, any bail, whilst their names remain on the bail-piece, may render. (*Roxburgh* v. *Cresswell*, 5 A. & E. 829). No notice of bail need be given where only put in to render. (*Wilson* v. *Griffin*, T. T. 1832, Ex., 2 C. & J. 683). Where an action is brought upon the recognizance, the render should be according to the practice of that Court, and not of the Court where the recognizance was taken. (*Dibbins* v. *Taylor*, M. T. 1826, Ex., 1 Y. & J. 15).

† In actions of debt render to be made at any time within fourteen days after service of process on bail. (*Reg. Gen.* H. T. 2 Will. 4, and *Reg. Gen.* T. T. 3 Will. 4). And on a sci. fa., before the return day of the writ of sci. fa. (*Saunderson* v. *Brown*, M. T. 1837, 2 N. & P. 84; S. C. 6 D. P. C. 9). A render after bail-bond taken, and within eight days of the arrest, is good. (*Turner* v. *Brown*, 2 D. P. C. 547). The defendant may render after the giving of a bail-bond, and within eight days from the time of the arrest. (*Turner* v. *Brown*, T. T. 1834, K. B., 2 D. P. C. 547).

‡ Render may be to prison of Court or to county jail. (By 21st sec. 11 Geo. 4 & 1 Will. 4, c. 70). But the Palace Court is not in the nature of a superior Court of record within 11 Geo. 4 & 1 Will. 4, c. 70, s. 21. (*Scaith* v. *Brown*, H. T. 1836, B. C., 5 D. P. C. 412—S. P. *Lawes* v. *Hutchinson*, H. T. 1835, Ex., 1 C., M., & R. 765; S. C. 3 D. P. C. 506).

§ Render of a party already in custody may be effected by giving a notice in writing to plaintiff. (By sec. 22 of the 11 Geo. 4 & 1 Will. 4, s. 70). But render without notice is of no avail, though subsequent proceedings set aside on payment of costs. (*Thorne* v. *Hutchinson*, T. T. 1824, K. B., 3 B. & C. 112; S. C. 4 D. & R. 712).

‖ The right to render only terminates when the bail ceases to be liable. (*Rex* v. *The Sheriff of Middlesex*, M. T. 1826, C. P., 6 Bing. 251).

¶ A render is equivalent to a justification. (*Capon* v. *Bond*, M. T. 1828, Ex., 2 Y. & J. 531). And no proceedings can be taken after notice of render. (*Lewis* v. *Grimstone*, T. T. 1837, B. C., 5 D. P. C. 711). But render is no stay of proceedings, under Reg. Trin. 3 Will. 4, unless the costs of writ and service be paid. (*Horn* v. *Whitcombe*, M. T. 1836, Ex., 5 D. P. C. 328).

** To obtain time to render, the affidavit must clearly and explicitly disclose

## 8. *Amendment of Order of*.*

### (*b*) By other means†.

the grounds of the application. (*Show* v. *Cash*, T. T. 1825, C. P., 1 Bing. 80). Time for rendering allowed, though bail have not justified, where principal in criminal custody. (*Gibson* v. *White*, M. T. 1831, Ex., 2 C. & J. 85; S. C. 2 Tyrw. 162). Or in jail under a conviction for a misdemeanour. (*Ashmore* v. *Fletcher*, E. T. 1824, Ex., 13 Price, 523; S. C. M'Clel. 252—S. P. *Campbell* v. *Ackland*, M. T. 1832, Ex., 1 D. P. C. 635; S. C. 1 C. & M. 73; S. C. 3 Tyrw. 230—S. P. *Roach* v. *Boucher*, H. T. 1818, 10 Price, 104). Or after conviction and a point reserved. (*Joyce* v. *Pratt*, M. T. 1825, C. P., 6 Bing. 628). So, to enable a bankrupt to make out his accounts under a country commission. (*Offley* v. *Dickens*, H. T. 1832, K. B., 6 M. & Scott, 348). So, when it would be inconvenient for a Court of Bankruptcy to attend the prison to which the principal would be rendered. (*Harris* v. *Alcock*, E. T. 1832, Ex., 1 D. P. C. 568; S. C. 2 Tyrw. 448; S. C. 2 C. & J. 486). So, where the defendant had been committed by a Court of Bankruptcy, the Court gave time to render. (*Waugh* v. *Ashford*, M. T. 1834, C. P., 1 Bing. N. S. 294, 1 Scott, 167, and 3 D. P. C. 23). With respect to allowing time for the render to be enlarged where the party is become bankrupt, there is no distinction between town and country commissions. (*Rushton* v. *Greene*, E. T. 1834, Ex., 2 D. P. C. 617). But, as bail are not precluded from rendering on account of the bankruptcy of their principal, the Court refused therefore to enlarge the time until after his final examination. (*Coombs* v. *Dodd*, M. T. 1830, C. P., 3 M. & Scott, 817). So, the Court refused on account of illness of principal. (*Warrington* v. *Sammell*, H. T. 1828, C. P., 10 Moore, 170).

* Order for render may be amended. (*Green* v. *Jacob*, E. T. 1836, 3 Tyrw. 231).

† Bail are entitled to be relieved wherever the principal is entitled to his discharge. (*Todd* v. *Maxfield*, T. T. 1824, K. B., 3 B. & C. 222; S. C. 5 D. & R. 258—S. P. *Bottomley* v. *Medhurst*, T. T. 1834, Ex., M'Clel. 399; overruling *Glynn* v. *Yeates*, 8 Mod. 31—S. P. *Humphreys* v. *Knight*, E. T. 1826, C. P., 6 Bing. 569). Bail entitled to be discharged where the process was in plaintiff's own right, and declaration by her as executrix. (*Manesty* v. *Stevens*, M. T. 1832, C. P., 1 D. P. C. 711; S. C. 2 M. & Scott, 565, 9 Bing. 400). But, a variance in the copy of process served on the defendant where the original is correct:—Held, merely an irregularity, and requiring the application to be made within the time for putting in bail. (*Brashour* v. *Russell*, M. T. 1837, C. P., 4 Bing. N. S. 31, 6 D. P. C. 185, and 3 Scott, 268). Taking a cognovit of principal without knowledge of bail does not discharge them, unless by its terms he is to have longer time than allowed by the ordinary course of proceeding. (*Stevenson* v. *Roche*, T. T. 1829, K. B., 9 B. & C. 707—S. P. *Whitfield* v. *Hodges*, M. T. 1835, Ex., 1 M. & W. 679; S. C. 1 T. & G. 1061). Even though the plaintiff may have said, on application for further time, that defendant might rely on his honour. (*Ladbrook* v. *Hewett*, M. T. 1832, K. B., 1 D. P. C. 488). And the bail cannot be proceeded against after the death of their principal, where no notice has been given of the principal's default. (*Surman* v. *Bruce*, M. T. 1830, 10 Bing. 434). And without their consent giving time to the principal, although the bail are not damnified:—Held, to discharge them. (*Hannington* v. *Beare*, T. T. 1835, Ex., 4 D. P. C. 256). After the commencement of a negotiation with the principal, with the consent of the bail, proceedings cannot be taken against the latter without notice. (*Charleton* v. *Morris*, H. T. 1828, C. P., 6 Bing. 427; S. C. 4 Moore, 114—S. P. *Cleft* v. *Gye*, E. T. 1829, K. B., 9 B. & C. 423). Held, that if bail apply to be discharged on the ground of time given to the principal, they must apply in the term next after the agreement for giving time comes to their knowledge. (*Vernon* v. *Turley*, H. T. 1836, Ex., 3 C., M., & R. 316; 4 D. P. C. 660). Laying venue in different county than that into which process issued not to discharge bail. (*Reg. Gen.* H. T. 2 Will. 4). And where, by an order for amending the declaration, new causes of action were inserted, not included in the writ, and increasing the amount of damages claimed; but the alterations were not such as to destroy the identity of the suit:—Held, that the bail in sci. fa. on the recognizance were not discharged thereby from their liability. (*Taylor* v. *Wilkinson*, E. T. 1832, K. B., 5 N. & M. 109). In an action on an attorney's bill, after forfeiture of the bail-bond and an assignment taken, an agreement to stay proceedings for a month, and not tax the bill, does

(*c*) PRIVILEGES OF BAIL IN TAKING PRINCIPAL*.

## XXI. EXONERETUR.

BATEMAN *v.* DUNN, M. T. 1838. C. P. 5 *Bing. N. S.* 49.

An exoneretur entered where a defendant was arrested before 1 & 2 Vict., though resident in Ireland;

ON motion to enter an exoneretur, under the 1 & 2 Vict. c. 110, it appeared that the defendant was arrested on the 13th September, 1838, and put in special bail on the 27th. The defendant's discharge was opposed, because he was an Irish barrister, and about to leave England.

*Per Cur.*—It is the duty of the Court to carry the statute into effect; and, where a defendant is out on bail, and the bail are entitled to render, we are, without such render, entitled to discharge the defendant, unless it appears the defendant is about to quit England, unless forthwith apprehended.

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DALTON *v.* GIB, M. T. 1838. C. P. 5 *Bing. N. S.* 113.

but an exoneretur will not be entered on the bail-piece where defendant is in Scotland†.

MOTION to enter an exoneretur on the bail-piece. It was opposed because the defendant was in Scotland, and had been there since January, 1838.

The Court refused the application, because the defendant could not be rendered by his bail.

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## XXII. RIGHTS OF BAIL AGAINST PRINCIPAL‡.

not discharge the bail. (*Woosnam* v. *Price*, H. T. 1833, Ex., 1 C. & M. 352; S. C. 1 D. P. C. 681).

* Bail may take their principal even whilst he is attending Court as a witness. (*Ex parte Lyne*, E. T. 1819, N. P., 3 Starkie, 132; *Horn* v. *Swinford*, H. T. 1840, N. P., 1 D. & R., N. P. C., 20). Or a bankrupt during his privilege from arrest. (*Payne* v. *Spencer*, H. T. 1817, K. B., 6 M. & S. 231). But bail by sheriff have no right to take their principal into custody, nor have bail in the Palace Court. (*Rex* v. *Hughes*, T. T. 1828, N. P., 3 C. & P. 373). And render by sheriff's bail without the principal's consent, a false imprisonment, for which an action will lie. (*Birt* v. *Roberts*, H. T. 1834, N. P., 1 M. & M. 177).

† Where, at the time of 1 & 2 Vict. coming into operation, the defendant was out on bail, and had quitted the kingdom, and it was sworn he intended to remain abroad, the Court refused to enter an exoneretur. (*Lewis* v. *Ford*, M. T., 1838, Ex., 7 D. P. C. 85, and 4 M. & W. 361). After a writ of execution brought, an application for an exoneretur should be made to the Court in which the recognizance was originally taken, and not to the Court of appeal. (*Sherratt* v. *Floyer*, H. T. 1819, C. P., 2 Bing. 18). On principal being elected M. P., the bail are entitled to an exoneretur, even after final judgment. (*Phillips* v. *Wellesley*, M. T. 1830, K. B., 1 D. P. C. 9). Exoneretur entered, where the plaintiff described himself by two Christian names in the writ and only by one in the declaration. (*Grindall* v. *Smith*, H. T. 1826, C. P., 1 M. & P. 24).

‡ Bail, who pay each his share, may jointly recover the amount. (*May* v. *May and Others*, M. T. 1823, N. P., 1 C. & P. 44). The loss of time and expenses of a journey cannot be recovered in an action against bail. (*Reason* v. *Wirdnam*, T. T. 1824, N. P., 1 C. & P. 434). A memorandum to indemnify bail, where the debt is more than 20*l.*, requires a stamp, though no sum is mentioned in the agreement. (*Wrigley* v. *Smith*, H. T. 1834, K. B., 3 N. & M. 181).

# Bail in Criminal Proceedings.

See tits. *Commitment—Libel—Outlawry.*

(3 *Peters. Abr.* 299).

I. BY WHOM ACCEPTED.
(*a*) By the court of king's bench, p. 568.
(*b*) By justices of the peace, p. 568.
(*c*) By justices of gaol delivery, p. 570.
II. OF THE NUMBER OF BAIL REQUIRED, p. 571.
III. OF THE LIABILITY OF, p. 571.

## I. BY WHOM ACCEPTED.

### (*a*) By the court of king's bench*.

The King *v.* Joseph Massey, H. T. 1817. K. B. 6 *M. & S.* 108.

The Court will allow a defendant charged with a felony, if too poor to bear the expense of appearing before the Court, to be bailed before a magistrate in the country.

The defendant was committed by the coroner for manslaughter; a habeas corpus and certiorari to remove proceedings from before the coroner having been obtained, an application was made to bail the defendant before a magistrate in the country, without appearing before the Court, on the ground of the defendant's poverty.

On the authority of a previous manuscript case, the Court granted the application, the name of the magistrate being mentioned in the rule†.

### (*b*) By justices of the peace‡.

* In *The Queen* v. *Scaife*, 9 D. P. C. 553, it was propounded by *Coleridge*, J., that the principle on which a party, committed to take his trial for an offence, may be bailed, is founded on the probability of his appearing to take his trial, and not on his supposed guilt or innocence; but the fact of a bill having been found against him is material in estimating that probability.

† It does not appear, by the report in the above case, whether an affidavit was produced to prove the poverty of the defendant, or whether the Court took the statement of counsel as sufficient proof of the fact; but it is now quite certain, by the cases of *Rex* v. *Booker*, (2 D. P. C. 446), and *Reg.* v. *Gregory*, (M. T. 1840, B. C., 9 D. P. C. 129), that such an affidavit is unnecessary. But it seems that although a positive affidavit of poverty is not required, it should appear from the affidavit in support of the application, that the defendant is in such a situation of life that he will be unable conveniently to bear the expense of appearing before the Court. In *Ex parte Martins*, (M. T. 1840, B. C., 9 D. P. C. 194), it was held, that where a defendant seeks to be discharged out of custody, on the ground that the warrant of commitment on which he is detained is illegal, he must be brought before the Court by habeas corpus, although it is sworn that he is too poor to bear the expense, as the validity of the warrant will not be discussed in his absence.

In the *Queen* v. *Williams*, (H. T. 1840, B. C., 8 D. P. C. 301), it was held, that service of a rule nisi for bailing a defendant on a charge of manslaughter, may be effected on the coroner only, when no next of kin to the deceased or husband can be discovered.

‡ Previous to the passing of the 7 Geo. 4, c. 64, a variety of nice distinctions and limitations existed, (see 3 Peters. Abr. 335), as to the cases in which justices could admit persons accused or suspected of felony or misdemeanour to bail. The

*Ex parte* ALLEN, H. T. 1834. K. B. 3 *N. & M.* 35.

ON motion for a writ of habeas corpus, it appeared that the applicant had been taken before three magistrates, charged with a felony, and after evidence of the felony had been gone into was

The 7 Geo. 4, c. 64, does not prohibit magis-

provisions of that statute remove all those distinctions and point out the cases in which the justices may exercise their discretion to bail, and the manner in which that discretion is to be exercised. It provides, 1. "That, where any person shall be taken on a charge of *felony or suspicion of felony*, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner hereinafter mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall, in their opinion, weaken the presumption of his or her guilt, but there shall, notwithstanding, appear to them, in either of such cases, to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail by such two justices in the manner hereinafter mentioned: provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same."

2. "That the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison any person arrested for felony or on suspicion of felony, shall take the examination of such person and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare anything material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a County Palatine, or Great Sessions, or Sessions of the Peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice, respectively, shall subscribe all such examinations, informations, bailments, and recognizances, and deliver, or cause the same to be delivered, to the proper officer of the Court in which the trial is to be, before or at the opening of the Court." By section 3, "That every justice of the peace before whom any person shall be taken on a charge of *misdemeanour, or suspicion thereof*, shall take the examination of the person charged and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison or require bail from the person so charged: and, in every case of bailment, shall certify the bailment in writing; and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony; and shall subscribe all examinations, informations, bailments, and recognizances, and deliver, or cause the same to be delivered, to the proper officer of the Court in which the trial is to be, before or at the opening of the Court, in like manner as in cases of felony." It further enacts, by section 5, "That if any justice or coroner shall offend in anything contrary to the true intent and meaning of these provisions, the Court to whose officer any such examination, information, evidence, bailment, recognizance, or inquisition ought to have been delivered, shall, upon examination and proof of the offence, in a summary manner, set such fine upon every such justice or coroner as the Court shall think meet." Then, by section 6, it is provided, "That all these provisions relating to justices and coroners shall apply to the justices and coroners not only of counties at large, but also of all other jurisdictions."

The spirit of these provisions was still further extended by the provisions of

trates from first admitting a party to bail, and, on a further hearing, having been again apprehended, committing him to prison.

admitted to bail, upon his giving his own recognizance and that of two other persons for his appearance at the next Assizes. He was afterwards apprehended again and brought before two of the same magistrates, when further evidence was gone into and he was committed to gaol.

*Per Cur.*—The course adopted is most proper. The whole matter is not fully investigated in the first instance; subsequently, fresh evidence is procured and the party is committed.

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### (*c*) By justices of gaol delivery*.

5 & 6 Will. 4, c. 33, s. 3, which, after reciting, "That in many cases the taking of bail for the appearance of persons charged with felony may be safely admitted without endangering the appearance of such persons to take their trial in due course of law, and it is therefore expedient in such cases to amend and extend the provisions, in that respect, of an act passed in the 7th year of King George the 4th, intituled 'An Act for improving the Administration of Criminal Justice in England;' it is enacted, that it shall be lawful for any *two* justices of the peace, if they shall think fit, (of whom one or other shall have signed the warrant of commitment), to admit any person or persons charged with felony, or against whom any warrant of commitment for felony is signed, to bail in the manner and according to the provisions directed by the said recited act, in such sum or sums of money and with such surety or sureties as they shall think fit, and *notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt.*"

Since these enactments, *one* justice cannot take bail on a charge of *felony, or suspicion of felony.* It seems that he must either dismiss the charge, or commit the accused, if there be positive credible proofs, or a strong presumption of guilt. And if he is of opinion, that there is not a strong presumption of guilt, yet, at the same time, that he ought not to dismiss the charge, then he must order the party to be detained until he be taken before two justices.

If the prisoner be brought before *two* justices, either in the first instance or on being ordered to be detained by a single justice, or after a warrant of commitment made, they may, if they are of opinion that there is not a strong presumption of guilt, but that still sufficient appears against him to make a judicial inquiry proper, admit him to bail. And they may admit him to bail, not only if no strong presumption of guilt is raised by the evidence adduced on the part of the accused, but also when it has been raised, but is weakened by the evidence for the accused. They may also, even though the prisoner has confessed his guilt, or though they think the charge is not groundless, or that there is a presumption of his guilt, in their discretion, admit him to bail, if they consider that he may be safely so admitted to bail without endangering his appearance, one of the justices so admitting him, where there has been a warrant of commitment, having signed such warrant.

By 2 & 3 Vict. c. 71, which was passed for regulating the Police Courts of the metropolis, it is provided by section 14, "That it shall be lawful for any one of the said magistrates appointed or hereafter to be appointed to do alone any act at any of the said Courts, or at any place where her Majesty shall order any such Court to be holden within the limits of the metropolitan police district for the time being, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one justice." It seems, therefore, from the enactments contained in this section, that where a party is charged with felony or misdemeanour, or the suspicion of either, within the jurisdiction of the Police Courts of the metropolis, *one* magistrate, appointed pursuant to that act, may exercise the same powers as to bailing as, by the 5 & 6 Will. 4, c. 53, s. 3, are vested in *two* magistrates, there being no such words of exclusion contained in that act as appear to be contemplated by the 2 & 3 Vict. c. 71, s. 14.

* Where a true bill had been found for a rape, *Patteson*, J., refused to continue the prisoners on their recognizance to the next Assizes, it being alleged that the prosecutrix's non-appearance had been procured by money, but ordered them to be detained. (*R.* v. *Guttridge*, 9 C. & P. 228). *Hullock*, B., refused to compel a coroner to find bail for his appearance to receive judgment, after he had been

## II. OF THE NUMBER OF BAIL REQUIRED.

THE KING *v.* SHAW, E. T. 1825. K. B. 6 *D. & R.* 154.

In all cases of felony four sureties must be given; a less number is insufficient.

NOTICE of four bail had been given to the prosecutor, but two only attended.

*Per Cur.*—In cases of felony there must be four sureties, except where all the parties are before us, and we are not satisfied that the case justifies us in taking only two. The invariable rule is, to require four bail in cases of felony.

The two bail in attendance were then taken in 20*l.* each, and the defendant's recognizances in 80*l.*, but he was remanded to Winchester Gaol, and leave was given to put in two other bail: and upon their entering into recognizances in 20*l.* each, the defendant was to be discharged; the rule for his discharge to be served on the gaoler.

## III. OF THE LIABILITY OF*.

**Bail in Error.** See tit. *Error.*

**Bail on Removal of Causes from Inferior Courts.** See tits. *Certiorari, Habeas Corpus.*

**Bailiff.** See tit. *Arrest.*

found guilty of corruption in his office, as no disposition to abscond was manifested. (*Rex* v. *Whitcomb*, 1 C. & P. 124). Where bills for misdemeanours are found under the commission of oyer and terminer at the Central Criminal Court, the defendant must give forty-eight hours' notice of bail, unless the application for process is made on a Friday, in any case in which there is reason to think that there is a desire to keep the party in custody over Sunday. (*R.* v. *Carlisle*, 6 C. & P. 628). The Judges at the Central Criminal Court, after postponement till the next session, on motion for the prosecution of the presentation of a bill for a capital offence, refused a motion at the instance of the prisoner to read over very long depositions, to enable them to decide whether they could admit him to bail, although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the Court. (*Rex* v. *Palmer*, 6 C. & P. 654). A Judge will not admit a prisoner to bail, after the grand jury have returned a true bill against him for murder. (*R.* v. *Chapman*, 1838, N. P., 8 C. & P., 558). Where a prosecutor of an indictment for embezzlement was absent from England, and on that account the trial was postponed, the prisoner was discharged by *Littledale*, J., on his own recognizance. (*Rex* v. *Crowe*, 1829, N. P., 4 C. & P. 251).

* Bail on a recognizance under 5 & 6 Will. 4, c. 11, are liable to the costs if the principal die after conviction, and before the day in bank. (*Rex* v. *Turner*, T. T. 1824, K. B., 3 B. & C. 160; S. C., 4 D. & R. 816. See *Rex* v. *Fynmore*, 8 T. R. 409).

# Bailment.

(See tits. *Innkeeper—Lien—Post-Office—Stable-keeper—Trover.*)

FREEMAN *v.* BIRCH, E. T. 1833. K. B. 1 *N. & M.* 420.

A laundress has a sufficient special property, as a bailee, to maintain an action against a carrier for loss of goods*.

THE plaintiff, a laundress, was in the habit of sending linen to and from London by the defendant's cart. A basket of linen belonging to A. B. was sent by the defendant's cart, and, on its way to London, part of the contents were either lost or stolen. A. B. did not pay the carriage of the linen. It was objected, on the part of the defendant, that the present action was misconceived, and that the action should have been brought by the owner of the linen. *Patteson*, J., overruled the objection, and the verdict was found for the plaintiff.

And the Court, on motion, refused a new trial.

*See* 5 *Burr.* 2680; 1 *T. R.* 569.

# Bankers.

(See also tits. *Bankrupt—Bills and Notes—Cheque—Lien—Set-Off; and 7 Geo.* 4, *c.* 46—Abridged post, tit. *Joint Stock Company*).

I. RIGHTS OF, p. 572.
II. DUTIES AND LIABILITIES OF, p. 576.
III. ENTRIES IN BOOKS AND ACCOUNTS OF, WHEN EVIDENCE, p. 582.
IV. ACTION BY AND AGAINST.
(*a*) WHEN AN ACTION LIES, p. 582.
(*b*) PLEADINGS IN, p. 584.
(*c*) EVIDENCE IN, p. 585.
(*d*) JUDGMENT AND EXECUTION, p. 586.

## I. RIGHTS OF.

BANK OF ENGLAND *v.* ANDERSON, H. T. 1837. C. P. 3 *Bing. N. S.* 589; S. C. 4 *Scott*, 50.

Banking firms of more than six persons, and within sixty-

THE London and Westminster bank is a co-partnership consisting of more than six persons, united in covenants, carrying on in London all such parts of the business of banking as are usually carried on by London private bankers. One George Alfred Mus-

* The bailee of a dog for reward must take due care of the dog; and, if it be lost, the bailee must shew he was not in fault. (*Gurney*, B.—*Mackenzie* v. *Cox*, M. T. 1840, N. P., 9 C. & P. 632).

kelt carries on business as a banker at St. Albans, which is a town within sixty-five miles of London, in the county of Hertford, on his own sole account, and is registered at the Stamp-office as the sole person interested in such bank, under the style and firm of The Bank of St. Albans. The said George Alfred Muskelt keeps a banking account with the London and Westminster bank, and the London and Westminster bank act as the London agents of the said George Alfred Muskelt, and receive and collect for him his London monies, and place the same when received to his credit, and hold the same at his disposal, as London bankers usually do for their customers. The bank of St. Albans has not any connexion whatever with the London and Westminster bank, except that the London and Westminster bank act as the London agents of the St. Albans' bank. On the 21st February, 1835, one W. J. Robinson applied at the office of the said bank of St. Albans for a bill of exchange on London for 25*l.*, and paid Henry Edwards, the clerk of the said George Alfred Muskelt, the sum of 25*l.* for the same; and thereupon the said George Alfred Muskelt, by the said Henry Edwards, his clerk, drew upon the said London and Westminster bank a bill of exchange, and delivered the same to the said W. J. Robertson. On a case sent by the Master of the Rolls for the opinion of the Court, whether the said acceptance by the said London and Westminster bank, of the said bill, was lawful, having regard to the provisions of the act 3 & 4 Will. 4, c. 96, and other acts passed, and now in force, respecting the Bank of England—

five miles of London, cannot as such accept a bill at less than six months, under the statutes relating to the Bank of England*.

*Per Cur.*—The question above stated depends for its answer upon the construction to be put upon the stat. 3 & 4 Will. 4, c. 98, the statute which is at present in force and operation; and the particular clause of the statute, which bears upon it, is sect. 3, by which it is enacted, "that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty miles thereof, provided that such body politic, or corporate, or society, or company, or partnership, do not borrow, owe, or take up, in England, any sum or sums of money, on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof." These prohibiting words are found originally in the 9th sect. of the stat. 6 Anne, c. 22, by which statute any direct restriction was for the first time imposed upon the rights of the public in favour of the Bank of England. The question is, whether a copartnership consisting of more than six persons, and carrying on the trade or business of bankers within the sixty-five miles from London, can, by law, in the course of such trade or business as bankers, accept a bill of exchange payable at less than six months from the time of the giving of such acceptance? And we are of opinion, regard being had to the various statutes which relate to the Bank of England, that such an acceptance is not a lawful acceptance. In thus stating the question, we purposely insist, as one of its terms, that the acceptance is given in the course of the defendants' trade or business of bankers: first, because such appears to

* A note at a shorter date than six months, made by a firm of more than six individuals, bankers, or for the purpose of banking, is valid. (*Perring and Others* v. *Dauston*, N. P., 1 R. & M. 426).

us to be the necessary character of the transaction described in the case; and, secondly, because we are unwilling to embarrass the general question with the consideration of one of much less importance, viz., where an acceptance given by more than six persons in partnership as bankers, but given in payment of their private debt, or for goods sold, or salaries of clerks, or rent, or the like, would or would not fall within the restrictions created by the several statutes still in force.

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PEASE *v.* HIRST, M. T. 1829. K. B. 5 *M. & R.* 88.

A note deposited with bankers as a continuing security, is not discharged by the bankers having at one time sufficient in their hands to cover the amount of the note.

A. GAVE his bankers, as a security for advances, a note by which he and B. jointly and severally promised to pay on demand, to the bankers, or order, 300*l.*, with interest. The bankers credited A. with the amount of the note, and debited him yearly with interest. At one time A. had a balance in the bankers' hands exceeding the amount of the note.

*Per Cur.*—There was at one time a balance of 642*l.* in his favour; and it is contended, that the debt due on the note has been wiped off by that balance. But it does not appear that this was a cash balance; and, if not, the bankers were clearly under no obligation to apply it to the note in question. But even if it had been a cash balance, were they bound to do so? No: for that would be inconsistent with the original intention for which the note was given. The case might be different if the surety had made any application to that effect; but, as it were, there was not in the form of the note any legal obligation on the banker so to apply the balance.

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CUNLIFFE *v.* BOOTH, T. T. 1837. C. P. 3 *Bing. N. S.* 821.

A banker who discounts a bill for a customer, may sue a prior indorser, though he received no consideration, and the bankers knew the customer acted as bill-broker.

To an action on a promissory note, the defendant pleaded that the note was made by A., and indorsed by the defendant to B. To raise money on that, B. delivered the note to C. to get it discounted, and C. delivered it to D., a bill-broker, and that the defendant had no value for the note, and that the plaintiff, the banker, knew it. At the trial, it appeared that C. took the note to the plaintiff to be discounted. But he stated that if D. bought it he could lend money on that and other bills. D. accordingly took the bills, and the plaintiff discounted them. In conversation between plaintiff and C., C. told the plaintiff that D. merely held the note to get it discounted. It was contended that the plaintiff had not used due caution; but the jury found for the plaintiff. On motion for a new trial—

The Court refused to interfere; because, when D. indorsed the note, on which this action was brought, with the other bills, the plaintiff might infer that he was fully authorized to do so.

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FULLER *v.* SMITH, H. T. 1824. N. P. 1 *C. & P.* 197.

A banker discounting the acceptance of a customer for a third party may recover

ACTION for money had and received. The plaintiffs were bankers, and had discounted the acceptance of one of their customers for the defendant. After giving the latter the amount, it was ascertained that the acceptance had been forged.

Lord *Tenterden* held, that the action was maintainable. With

respect to the argument that the plaintiffs ought to have known the handwriting of the acceptor, he was of opinion that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill; for his attention is not called to it then.

back the money on discovering it to be a forgery.

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ATKINS *v.* OWEN, E. T. 1836. K. B. 6 *N. & M.* 307; S. C. 4 *A. & E.* 819.

THE defendant had deposited with the plaintiff's banker a bill of exchange accepted by a third party, and received credit for its amount. Since that he had continued to deal with his account generally, without drawing specifically upon the bill, the balance in his favour being, at times, less than the amount of that security. The bill, which was payable sixty days after sight, became due after action brought, and was paid at maturity. Upon this evidence Lord *Denman*, C. J., being of opinion that the facts proved would not support the action—

Where a bill is deposited with a banker, who makes an advance on it, the banker cannot sue his customer until the bill be dishonoured.

*Per Cur.*—We are to consider the case as if the bill were not yet due. The defendant has received money from his banker upon the credit of the bill. If, therefore, it should not be paid, he might be called upon to repay the banker, and, if held liable in the present action, might pay the amount which he has received twice over.

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HALL *v.* FULLER, T. T. 1826. K. B. 5 *B. & C.* 750; S. C. 8 *D. & R.* 464.

THE plaintiffs kept cash at the house of the defendants, who were bankers. The plaintiffs having occasion to pay a sum of 3*l.* to a tradesman, drew a cheque for the amount upon the defendants, and delivered it to the payee, who told them it was wanted to send into the country. It was drawn and filled up by one of the plaintiffs in the usual form, signed in the name of the firm, payable to the payee or bearer, with the plaintiffs' signature, and the date. When the cheque was presented for payment, three days afterwards, it had been altered by the person to whom the tradesman had paid it. The alteration consisted, of expunging the whole filling up in the body of the cheque, and restoring it, with this difference, that the sum filled up was 200*l.* instead of 3*l.* This was done in such a manner, that no one in the ordinary course of business would have observed it. No suspicion being entertained by the defendants' clerks, it was paid at the counter, as a matter of course. At that time the plaintiffs' balance in the defendants' hands amounted only to 183*l.* 15*s.* 5*d.* In no former instance had the plaintiffs overdrawn their account; and had never given the defendants notice that they wished to have credit beyond the balance in hand. The plaintiffs finding, afterwards, that the account was overdrawn, the fraud was detected, and they called upon the defendants to indemnify them for the money which they had so paid without their authority, which the defendants refusing to do, this action was brought. The question for the opinion of the Court was, whether the action was maintainable, either for the whole or any part of the amount of the cheque.

Bankers paying a cheque for a larger amount than the sum for which it is drawn, in consequence of an unauthorized alteration, cannot charge their customers with the excess;

The Court were of opinion, that the risk of forgery, as between the banker and the customer, must be the risk of the banker.

He was not justified in paying any money without the authority of the customer to pay that particular sum, and they thought that it was immaterial whether a cheque was forged in the whole or in part. The final question was, to what amount had the customer authorized payment. Here the banker had paid a cheque which, in fact as well as in law, was forged, although the signature was genuine. He had, therefore, in his own wrong, and at his own loss, paid a sum which he could not charge to his customer. *Judgment for the plaintiff.*

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YOUNG *v.* GROTE, T. T. 1827. C. P. 4 *Bing.* 253.

unless the latter, by want of due care, has facilitated the fraud.

THE plaintiff gave to his wife certain cheques, signed by him in blank, to be filled up by her as occasion required. One of these cheques she caused to be filled up by her husband's clerk for 50*l.* 2*s.* 3*d.*; but the clerk so placed the words and figures on the cheque, that, when it was delivered to him again by the plaintiff's wife, for the purpose of receiving the amount, he interposed "three hundred," and received from the banker's 350*l.* 2*s.* 3*d.*

*Per Cur.*—A banker who pays a forged cheque cannot charge his customer with the payment, because it is made without authority. The cases cited were decided on this principle; for it is the banker's duty to know the handwriting of his customer, and, if he make a payment without authority, he alone must suffer. Nevertheless, if, through the fault of the customer, the banker pay more than he ought, he cannot be called upon to replace it. That principle is well illustrated by Potier. In the present case, has the plaintiff used ordinary care and diligence? It has been said, that it is requisite sometimes for merchants to sign cheques in this manner, to be filled up by agents; but they should, at all events, take care that those agents are persons conversant with business. Here the plaintiff left cheques, signed in blank, with his wife, who was not likely to be acquainted with business. If the cheque in question had been left in the hands of a man of business, he would have guarded against fraud in the filling of it up, by placing the word fifty, and the figure 5, in such a manner as to prevent the possibility of an improper substitution of a greater for the lesser sum; it was by the absence of these precautions that the defendants were induced to pay the sum claimed. And, therefore, as the defendants have been misled by the want of caution of the plaintiff, we think he cannot charge them with his loss.

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## II. DUTIES AND LIABILITIES OF*.

SIMS *v.* BOND, M. T. 1833. K. B. 2 *N. & M.* 608.

The payment of money into a banker's is, in

THE plaintiffs were joint part-owners of a ship. A. received the proceeds from time to time, and kept a banking account with the

* A banker in the country who receives notice of bank notes having been stolen, with a caution to stop them, is, in point of law, only bound to observe it for a reasonable time, if not continued. But where such notice had been given in September, 1834, and the defendant took the notes in October, 1835, the jury found for the plaintiff, who had lost them. *Abbott*, C. J.—*Snow* v. *Leatham*, T. T. 1826, N. P., 2 C. & P. 314). And a note being misdescribed as to date, makes no difference if the defendant were not misled. (Ibid.)

If a banker's clerk be sent with different securities, to be converted into notes

defendant, not in the names of the plaintiffs, but in his own name only. On A.'s death there was a balance at the banker's, and his executor then opened an account as such, and the balance was placed to that account. The plaintiffs, however, claimed the balance, and brought an action for money had and received, money lent, &c., but Lord *Denman*, C. J., nonsuited the plaintiffs, because there was no privity of contract. On motion to set aside the nonsuit—

law, a loan by the customer to the banker; hence, money deposited by A. for A. and B. cannot be recovered by a joint action by A. and B.

*Per Cur.*—The nonsuit was right. Sums which are paid to the credit of a customer with a banker, though usually called deposits, are in truth loans by the customer to the banker; (*Carr* v. *Carr*, 2 Mer. 541; *Devaynes* v. *Noble*, 2 Mer. 569); and plaintiffs who seek to recover the balance of such an account must prove that the loans were made by them. It is a well-established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractors may sue, but it may equally be applied to other cases; and we do not say that where a person lends money nominally on his own account, but really on account of, and as the loan of, another, the real lender may not sue for the money. But where money is lent by another in his own name, the plaintiff who alleges that he, the plaintiff, was in reality the lender, must prove that fact distinctly and clearly. He must shew that the loan, though nominally that of another, was really intended to be his own.

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STONE *v.* MARSH, E. T. 1827. K. B.; 6 *B. & C.* 551; 9 *D. & R.* 643. Abridged, post, tits. FORGERY—PARTNERS.

Bankers' partners are liable for money obtained by forgery committed by a co-partner if the proceeds be paid into the joint concern.

A., B. and C. were partners, bankers; C., D. and E. were trustees, and the trustees kept an account at the house of A., B. and C.; C. forged the names of his co-trustees, and sold out the stock, and paid the money into the banking-house. A. and B. were not cognisant of the forgery. On an issue out of Chancery, directing that the fact of C. being partner and co-trustee was not to be taken into consideration:—Held, that A. and B. were liable to D. and E. after C.'s execution for forgery.

and gold, and he returns with the gold only, which was in a different pocket, and states that the notes were stolen from him—and he dies before the trial of an action brought against a party in whose possession one of the notes was found. It will be for the jury to say whether the securities were stolen before or after they were converted. If the latter, it is immaterial whether the clerk embezzled them, or they were stolen. (*Abbott*, C. J.—*Snow* v. *Leatham*, T. T. 1826, N. P., 2 C. & P. 314).

A bill, payable at a bankers', was presented in the morning at 9 o'clock, and left with the bankers until 11 o'clock:—Held, that the bill must be considered in the course of presentment until 11 o'clock, and that if assets for a reasonable time before 11 o'clock came into the bankers' hands, and they did not pay it, the bankers were liable for damages:—held, also, that bankers are not bound to pay after bankers' hours; and, therefore, a presentment by the notary is not a presentment for payment. (*Parke*, B.—*Whitaker* v. *Bank of England*, M. T. 1834, N. P., 6 C. & P. 700.

INNES *v.* STEPHENSON, M. T. 1831. N. P. 2 *M. & Rob.* 145.

Money paid into a bankers' on account of assignees of a bankrupt can only be drawn out under the joint signatures.

IN an action of assumpsit by the plaintiff, as surviving assignee of a bankrupt against the defendants' partners, it appeared that the defendants were appointed bankers to the estate of the bankrupts; and, on opening the account, the plaintiff and his two co-assignees signed their names in the signature-book of the defendants in the usual way. The course of business in the office of the solicitors to the commission, upon a dividend being declared, was to make out a list, which they called a dividend list, containing the names of the creditors in alphabetical order. In this list the amount of the dividend of each creditor was placed opposite to his name. A considerable number of payments were made by the defendants to creditors named in the dividend list; but between the years 1820 and 1826 nine payments were made by them, which were stated in the pass-book to have been made to persons not named in the dividend-list, and in sums not corresponding with any of the sums therein mentioned. The cheques were in the usual form, and purported to be drawn by the plaintiff and his co-assignee. The signatures of the latter were genuine, but those of the plaintiff were forged.

Lord *Tenderden*, C. J., said, that the case was a very clear one; that money was paid to bankers by three persons, not partners in trade; that it had been stated that one of them could draw cheques so as to bind the others, but that was not the law, and to allow it would defeat the very object of paying the money in jointly.

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GILLARD *v.* WISE, H. T. 1826. K. B. 5 *B. & C.* 134.

A country banker receiving notes, to obtain payment for them, in the ordinary course, is not justified in parting with the possession of them without actual payment.

SPECIAL case.—The plaintiff deposited with defendants (country bankers) notes of the D., and other country banks, in the vicinity, which were received by defendants as cash, payable with interest, and transmitted to the D. bankers by their agent; but instead of immediately passing the notes to the latter, the D. bankers, being also agents to the defendants, entered them, according to the usual course of dealing, in account to their credit:—

Held, that having thereby trusted the D. bankers, the taking of such credit must, as between the plaintiff and the defendants, be taken as payment, and the plaintiff entitled, upon the failure of the D. bankers, to recover from the defendants the full amount so paid in. For, on receiving the notes, they became the plaintiff's agents; and their duty, as agents, was to present the notes for payment, and not to deliver them up to the makers without payment. What the defendants had done amounted clearly to an admission as between the plaintiff and them, that they had received the money.

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BOYD *v.* EMMERSON, M. T. 1834. K. B. 4 *N. & M.* 99.

Where A. and B. keep an account at the same bankers, and A. pays in B.'s cheque, the bankers have the same time to decide whether they will

DECLARATION in assumpsit:—That the defendants had been in, and were carrying on business at Sandwich, in Kent; that one Robert Matson had heretofore kept an account with the defendants, and had been used and accustomed to deposit money with them as bankers; that on the 17th November, 1832, he drew a cheque, according to the usage and custom of merchants, on the defendants, requesting them to pay the plaintiff, or bearer, 397*l.* 11*s.* 6*d.*; that the cheque was delivered to the plaintiff; that on its being pre-

pay the cheque as if drawn on another banker.

sented and shewn to defendants for payment thereof, in consideration of the plaintiff delivering up the cheque to them, they promised to pay the amount thereof; that plaintiff did in consequence deliver up the cheque to defendants, but they did not, nor would pay the amount. It appeared at the trial, that on the 17th November, 1832, Robert Matson drew a cheque on the defendants (with whom he then, and for two or three years antecedently, had kept an account) for 397*l.* 11*s.* 6*d.* in favour of the plaintiff, who also kept an account with the defendants, and had for a considerable period employed Robert Matson as his corn-factor and salesman. The plaintiff had before that time received Robert Matson's cheques drawn on the defendants. On the 17th November, 1832, Robert Matson was indebted to the plaintiff in a somewhat larger sum than the amount stated in the cheque. On the morning of the 18th (Sunday) Robert Matson delivered to the plaintiff the cheque, and on the 19th (Monday), about a quarter before 1 o'clock in the afternoon, the plaintiff took the cheque to the defendants' bank, and saw Mr. Reader, their cashier, and confidential clerk of the establishment, and gave him directions to provide for the payment of a bill made payable at their correspondents' in London (Glynn & Co.) for 75*l.*, in the following month. A memorandum of the request was made at the time by Mr. Reader. While Mr. Reader was making a memorandum of this request, the plaintiff, laying the cheque for 397*l.* 11*s.* 6*d.* on the counter, said, "Place this to my account," or "credit." No intimation was given to the plaintiff at the time, that his request to have the amount of the cheque carried to the credit of his account would or would not be complied with, or that Matson had overdrawn his account. Mr. Reader knew, at the time the cheque was presented, that Robert Matson was indebted to the bank upwards of 1,700*l.*, and doubted whether the cheque would be honoured by the defendants. A few minutes after the plaintiff left the banking-house, Reader took the cheque up from the counter, but did not debit Matson with the amount, or credit plaintiff with it, or cancel the cheque. Finding that no assets had been received to discharge the large amount of cheques drawn by Matson, the house determined not to pay any of them.

*Per Cur.*—It is not proved, that in consideration of the plaintiff delivering up the cheque to the defendants, they promised to pay the amount thereof. What passed when the cheque was left was equivocal, for it appears, that, while Mr. Reader was making a memorandum, the plaintiff, laying the cheque upon the counter, said, "Place this to my account," or "credit." No intimation was given to the plaintiff at the time, that his request would not be complied with. It seems to us, that if he had presented the cheque for payment, or had told Reader to put the amount to his credit, and Reader had assented to that, there might be ground for this action; but, according to the facts of this case, the plaintiff took this cheque, and paid it in to his bankers, subject to every rule and liability that other cheques are. It is often impossible to tell, till the close of the day, at the clearing hour, what sums of money may be paid in to each particular account, and the drafts upon it. We think, therefore, the defendants might, in this case, receive the cheque, subject to its being honoured or not, according to the course of the drawer's dealing with them on that day.

MARZETTI *v.* WILLIAMS, M. T. 1831. K. B. 1 *B. & Ad.* 415.

It being the duty of a banker to pay his customer's cheques, if a reasonable time has elapsed for him to know that funds have been paid in, an action will lie for dishonouring them.

ACTION upon the case, against the defendants, who were bankers, for not paying a cheque drawn on them by the plaintiffs, they having assets in their possession sufficient to cover the amount of the draft. It appeared that money was paid in a few minutes before 11 o'clock, and, ten minutes before 3, a cheque was presented, and was refused payment, for want of sufficient assets (the clerk who refused not being aware of the payment that morning). No special damage was proved.

*Per Cur.*—The defendants were guilty of a breach of duty, which duty the plaintiff at that time had a right to have performed. The jury have found, that when the cheque was presented for payment a reasonable time had elapsed to have enabled the defendants to enter the 40*l.* to the credit of the plaintiff; and, therefore, that they must or ought to have known that they had funds belonging to him. That was sufficient to entitle the plaintiff to recover nominal damages, for he had a right to have his cheque paid at the time when it was presented, and the defendants were guilty of a wrong by refusing to pay it. The form of the action, whether it be in tort or assumpsit, makes no substantial difference; nor can it be any legal ground of distinction, whether the foundation of the action be an express or an implied assumpsit. There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action, although no actual damage be sustained.

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EDWARDS *v.* VERE, T. T. 1833. K. B. 5 *B. & Ad.* 282; S. C. 2 *N. & M.* 120.

In the absence of a clear agreement to that effect bankers are not liable to pay interest on monies deposited with them.

THE bankrupt, and one W. Hyslop, in 1805, became jointly indebted to one David Gordon; they were sued by him in Scotland, and he there recovered a judgment against them, in 1826, for the amount of his debt and interest. Gordon being indebted to the defendants, who were bankers in London, in a sum greater than the amount of that judgment, assigned it over to them. The two Hyslops, in 1829, had awarded to them a sum of 10,000*l.*, in respect of a claim by them upon the government of Spain. A part of this sum, to the amount of 4,100*l.*, was deposited with the defendants on the 28th October, 1829. Upon Mr. Hyslop afterwards becoming bankrupt, the plaintiffs were appointed his assignees; and, in that character, they, on the 12th November, 1831, demanded the 4,100*l.* of the defendants, which they refused to pay. Upon the trial of this cause, the plaintiffs established their right to the money, but they also claimed interest from the time the demand was made. They obtained a verdict for the 4,100*l.*, with liberty to move to add the interest to the verdict.

*Per Cur.*—After the demand of the money by the plaintiffs, it became money had and received to their use, like the ordinary case of money in a banker's hands. It is no part of the engagement of a banker, that he is to honour cheques up to the removal of the balance in his hands, under a penalty of interest if he fail to honour them.

HUME *v.* BOLLAND, M. T. 1832. Ex. 1 *C. & M.* 130.

A banking firm consisted of A., B., and C., who had a power of attorney to receive dividends for D., C. acted under the power, and received the dividends, but having forged the name of D., sold out the stock, and still continued to enter the dividends as if received by the firm, when in fact no payment was made:—Held, on the bankruptcy, of A., B., and C., the firm were not liable.

CERTAIN stock was vested in trustees, upon trust, amongst other things, to pay the dividends to A. during his life; and, after his death, upon trusts for his widow and children. M. & Co. were the bankers of the trustees, and employed by them to receive the dividends. During the life of A. the amount of the dividends on the stock was regularly carried to the account of A. in the books of the firm, and drawn for and received by him. A. died on the 23rd of January, 1824; and, on his death, a new account was opened with the trustees in the books of the house, and in that account credit was given to the trustees for dividends, amounting to 1403*l.*, as received in April and July, 1824, and the trustees were debited with several sums, amounting to 225*l.*, paid to cheques drawn upon the house, on the presumption that the dividends had been actually received. In point of fact the above dividends had not been received by M. & Co., F., a partner in that house, having, in the lifetime of A., sold and transferred the stock in question by means of forged powers of attorney. F. continued, after this transfer, to enter in the day-book of M. & Co. the amounts of the half-yearly dividends on the days when they would have become due, as if he had duly received the same at the Bank of England, which amounts were, in the ordinary course of business, regularly posted from such day-book to the credit of the trustees by the clerk of M. & Co. Commissions of bankruptcy issued against the members of the firm of M. & Co. in September and October, 1824.

The Court held, that, at the date of those commissions, the bankrupts were not indebted to the trustees for the balance of the dividends appearing by the books to have been received.

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TARBUCK *v.* BIPSHAM, M. T. 1836. Ex. 2 *M. & W.* 2.

Where the customer of a banker becomes a lunatic, and his family continue the account, and the pass-book is regularly made up at the lunatic's death, his representatives cannot sue for the balance as upon an account stated.

A BANKER stated the balance of the account with his customer, who became a lunatic; during the lunacy balances were struck in the pass-book from time to time, a lucid interval occurred, and, after a relapse, there was an unsigned statement, in writing, of the balance, and a memorandum of payment to the son of the committee. The customer never sufficiently recovered his reason. In an action by the administrator, on an account stated—

*Per Cur.*—There is no evidence of any accounting here. The lunatic, at the time, was in a lunatic asylum; and, if there was any accounting at all, it was with some part of the lunatic's family, or with his committee, as his agent; but a lunatic is incapable of appointing an agent. There was, therefore, no accounting with any one on his behalf. If this settlement had taken place with the lunatic himself, in the terms which have been used by the defendant, we should have doubted whether any action could have been maintained upon it. There is but an acknowledgment of the existence of a part of the old debt. If that is not declared upon as a new promise it cannot be received in evidence, unless there be a memorandum in writing, signed by the party to be charged thereby. No action can be maintained upon the account, it not having been stated with the lunatic, but with a person incompetent to act as his agent.

## III. ENTRIES IN BOOKS AND ACCOUNTS OF, WHEN EVIDENCE.

FURNESS *v.* COPE, T. T. 1828. C. P. 5 *Bing.* 114.

To establish whether a customer had funds at his banker's, the latter's ledger is evidence*.

THE plaintiff, in order to shew that the bankrupts were in insolvent circumstances at the time the payment in question was made, produced (among other evidence) the ledger of the bankers with whom the bankrupts had an account. For the defendant, it was objected, that, inasmuch as the entries in this book were not exclusively made by the clerk by whom it was produced, and as all the clerks who made entries in it had not been called, it could not be received in evidence to shew what funds of the bankrupts were in the bankers' hands. The objection was overruled, and a verdict was taken for the plaintiff.

The Court said, that it was properly received in evidence; that it would be productive of the greatest inconvenience and mischief if they were to hold otherwise; and that, although such a book might not be admissible to prove that a party had money in the bankers' hands, it might clearly be received to shew that he had none.

## IV. ACTION BY AND AGAINST.

### (*a*) WHEN AN ACTION LIES.

VAN WART *v.* WOOLLEY, M. T. 1824. K. B. 3 *B. & C.* 439.

An action for negligence does not lie against a banker for not giving notice of non-acceptance, if the party were not entitled to notice in point of law.

IN assumpsit against the defendants, as the bankers and agents of the plaintiff, for neglecting to give due notice of the non-acceptance of a bill of exchange which the plaintiff had delivered to them to get accepted, in consequence of which laches the plaintiff alleged that, as the payee, he was prevented from giving due notice of the dishonour to the drawers, and also to Messrs. Irving, Smith & Woolley, who had delivered the bill to the plaintiff in payment of a debt due from them to the plaintiff, and whereby the plaintiff also alleged that he had not taken his remedy against the drawers and the said Messrs. Irving, Smith & Woolley. The payee, at Birmingham, paid it into his bankers at Birmingham, there to be sent for acceptance to the drawees, who resided in London. It was sent by them to their corresponding bankers in London, and presented for acceptance, but refused. No notice of the non-acceptance was given to the bankers at Birmingham, or to the payees.

*Per Cur.*—It is evident the defendants, who, it cannot be denied, are answerable to their London correspondents, had been guilty of neglect of the duty which they owed to the plaintiff, their employer; from whom they received a pecuniary reward for their services. The plaintiff is therefore entitled to maintain an action against them to the extent of any damages he may have sustained by their

* The pass-book delivered by a banker to his customer, containing only entries on one side, held not to be evidence of an account stated, although kept without objection by the customer. (*Ex parte Rawlinson*, 2 D. & Ch. 534).

A banker's clerk, who is called as a witness, is bound to state what balance the plaintiff or defendant had on a particular day. (*Abbott*, C. J.—*Lloyd* v. *Freshfield*, T. T., 1826, N. P., 2 C. & P. 325).

neglect. He lays his damage in two respects: first, for the loss of his remedy against Irving, Smith & Woolley, from whom he received it; secondly, by the loss of his remedy against the drawer of the bill. If, as between the plaintiff and Irving, Smith & Woolley, he has made the bill his own, and cannot call on them for the amount, his damage will be to the full amount for which the verdict has been obtained. The amount of his loss has not been inquired into or ascertained, and is probably much less than the amount of the bill. We are of opinion, the plaintiff has not, as between him and Irving, Smith & Woolley, made the bill his own. In the course of the argument, the situation of Irving & Co. was compared to that of a guarantee. The decisions that have taken place on actions brought against guarantees warrant the propositions before mentioned, namely, that the nature of the transaction and the circumstances of the particular case are to be considered. In *Warrington* v. *Furbor* (8 East, 242), a commission of bankruptcy was issued against the acceptor before the bill became due; presentment for payment to him was held unnecessary. *Phillips* v. *Astling* (2 Taunt. 206) stood on a different ground; in that case the bill was not presented for payment when it became due, as it ought to have been. Two days after, notice that it was unpaid was given to the drawer, for whom the defendant was guarantee. No notice was given to the defendant. The drawer and the acceptor had been solvent for many months, and it was not till they became bankrupts that any claim was made upon the defendants. Under these circumstances, because the necessary steps were not taken to obtain, from the parties to the bill, payment, while they continued solvent, the Court held the guarantee to be discharged. In *Holbrow* v. *Wilkins* (1 B. & C. 13), the acceptors were known to be insolvent. Some days after that fact was known, the plaintiff wrote to them to desire them to accept new bills. The bill was not presented for payment when due, nor any notice given to the defendants. It did not appear that the defendants sustained any damage. On this ground the Court held the guarantee was not affected. These decisions shew that cases of this kind depend on the circumstances peculiar to each. In the present case it does not appear that Irving & Co. have sustained any damage by want of notice of the non-acceptance. The drawer was not entitled to such notice; he sustained no injury. He had been bankrupt some months before the notice of non-acceptance could have reached Irving & Co. As to the supposed loss of the drawer, the amount of it has not been inquired into, or ascertained. Perhaps it may be merely nominal; and, if it is so, the plaintiff is entitled to a verdict for nominal damages.

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### Calland *v.* Loyd, H. T. 1840. Ex. 4 *M. & W.* 26.

A. placed a sum of money with B., his wife, to take care of. She deposited it at a bankers' in her infant son's name at interest:—held, that A. might

The plaintiff gave his wife the sum of 73*l.* to be taken care of by her. She deposited 50*l.*, part of this sum, with the defendants, who were bankers, in the name of R. B., aged twelve years, her son, by a former husband, and took, at the same time, an accountable receipt, whereby the bankers engaged to pay the money to the son, with interest, on his attaining twenty-one years. The wife was not known to the bankers. In an action for money had and received, by the husband against the bankers—

sue the bankers for money had and received.

*Per Cur.*—If a party delivers money to another, who is competent to make a contract in respect of it, and that other pays it over to a banker, the party delivering it shall not have an action against the banker; his remedy is against the party to whom he has delivered it. The case, indeed, is different if the banker has notice of the circumstances. What are the facts in this case? A married woman gets possession of 73*l.*, the property of her husband, and pays part of it over to bankers, who are the bankers of her infant son. Can the bankers, under these circumstances, set up the jus tertii as an answer? This, however, is not the case of jus tertii, for, in truth, the title set up is that of a party who has no right whatever to the money. The wife could not engage for her husband, as she was not his agent; nor for her son, as he was not in a condition to give her any authority.

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(*b*) Pleadings in.

Spillar *v.* Johnson, E. T. 1840. Ex. 8 *D. P. C.* 368; S. C. 6 *M. & W.* 570.

A declaration describing the public officer to be duly appointed as such, is sufficient.

The declaration stated, that the plaintiff had been duly nominated and appointed one of the public officers of the Northern and Central Bank, &c. Demurrer, because it did not appear in or by the declaration, that the plaintiff was a member of the co-partnership resident in England, and duly registered, according to the provisions of the 7 Geo. 4, c. 46, s. 4.

*Sed per Cur.*—The declaration is properly drawn. This case resembles that of an action by assignees of bankrupts; there it is not necessary to state in the declaration that they were elected by the creditors.

*See Hughes* v. *Thorpe,* 5 M. & W. 656.

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Ransford *v.* Copeland, E. T. 1837. K. B. 6 *Ad. & E.* 482.

In an action by a public officer of a banking company, plea, that the company was illegally associated, raises a question of law and fact, and therefore traversable.

In an action of assumpsit by one of the public officers of a banking company on a bill of exchange, the defendant pleaded that the company consisted of more than six persons, and that they were illegally associated together, and carried on trade for the purpose of borrowing and taking up money on their bills or notes payable on demand during the continuance of the privilege granted by 3 & 4 Will. 4, to the governor and company of the Bank of England; and the replication traversed that they were illegally associated, or carried on trade modo et formâ. It appeared that the company did take up money on their notes, payable on demand, thereupon plaintiff insisted that such proof entitled him to a verdict, inasmuch as the illegality of the association was not put in issue by the replication, being matter of law which is not traversable. The Judge who tried the cause, held, that it was incumbent on the defendant to go further, and prove the trading within sixty-five miles of London, (in order to shew the illegality of the association), and for want of such evidence, directed a verdict for the plaintiff.

*Per Cur.*—It is now admitted that the plea is bad, but contended, as at the trial, that it was proved in fact. The question is, whether

the allegation in the plea, that the company was illegally associated, is an allegation of a mere result of law, or of law and fact mixed. The distinction is obvious, and all the authorities, most of which are referred to in *Lucas* v. *Nochells*, turn upon it. We are clearly of opinion, that the allegation in this case is one compounded of law and fact, and therefore traversable.

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(*c*) Evidence in.

Edwards *v.* Buchanan, T. T. 1832. K. B. 3 *B. & Ad.* 788—S. P. Robertson *v.* Steward, M. T. 1840, C. P. 1 *Scott, N. R.* 419.

The appointment of the officers named in 7 Geo. 4, c. 46, may be proved by other evidence than the return to the Stamp-office.

The plaintiff sued, as the manager of the Manchester and Liverpool District Banking Company, upon a promissory note, indorsed by the defendant to the company. To shew the plaintiff's right to sue, according to the provisions of the 7 Geo. 4, c. 46, evidence was offered of the return made to the Stamp-office, in pursuance of that act; but the return appeared to have been made in April, 1831; while the declaration in this cause was intituled as of Michaelmas 1830. It was thereupon objected, on behalf of the defendant, that it did not appear that the plaintiff was the proper person to sue at the time of the commencement of the action. The plaintiff then proposed to give other evidence of his being, in fact, the manager at the time the action was brought; but the learned Judge, upon sect. 8 of the above act, which makes the Stamp-office returns evidence, was of opinion, that they were the only admissible evidence; and, therefore, he, upon the above objection, nonsuited the plaintiff. On motion to set aside the nonsuit—

Lord *Tenterden*, C. J.—We are all of opinion that the parol evidence ought to have been received. The act does not point out the Stamp-office return as the only evidence.

*See Williams* v. *Aspenall*, 7 Scott, 822.

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Armitage *v.* Haines, T. T. 1832. K. B. 3 *B. & Ad.* 793.

Nor need the particular authority given be shewn on the face of the returns.

This was an action by the plaintiff, as one of the public officers of the Huddersfield Banking Company, against the defendant, upon a bill of exchange. To shew that the plaintiff was entitled to sue according to the provisions of the 7 Geo. 4, evidence was given of the return filed, at the Stamp-office, by the company, on whose behalf the plaintiff sued as "one of the public officers." The return was intituled as follows:—"Return, or account, to be entered at the Stamp-office, in London, in pursuance of an act passed in the seventh year of the reign of King George the 4th, intituled, An Act for the better regulating Co-partnerships of certain Bankers in England," &c. &c. "Names and places of abode of all the partners concerned in the co-partnership of the Huddersfield Banking Company." It was thereupon objected—first, that the above return was insufficient; as the particular description of office filled by the plaintiff and Mr. Walker, while treasurer, cashier, auditor, &c., was not stated; secondly, that, as the places of abode, as well as the names of all the partners, did not appear, the provisions of the act had not been complied with.

Lord *Tenterden*, C. J.—As to the first objection—namely, that there are one or two persons here whose places of abode are not mentioned, and that the act requires the name or place of abode of the parties concerned, as the same appear upon the books of the corporation, non constat that this is not the way they are entered upon the books; but, were it otherwise, it would be hard to say, on that account, that that return is to have no effect, or is to be a mere nullity, or that it cannot be received in evidence. The next objection is, that the plaintiff and Mr. Walker are merely said to be public officers, and no other character is given to them; but the act does not require that any other official character shall be given to them. They may be named as persons appointed to be public officers who are members of the corporation, "together with the title of officer, or other description." The title of officer has not been given, but another description is given—namely, "esquire."

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### (*d*) Judgment and execution against.

Harwood *v.* Law, M. T. 1840. Ex. 8 *D. P. C.* 899.

A public officer is liable on a judgment without a sci. fa. if a shareholder in the company.

The defendant was the registered public officer of the Imperial Bank of Manchester, under the provisions of the 7 Geo. 4, c. 46, and had been taken in execution upon a judgment obtained by the plaintiff, in an action against him as such public officer. On a rule to set aside the execution and discharge the defendant out of custody, the affidavit, in support of the application, stated that the defendant had no funds of the company's in his hands, out of which the plaintiff's demand could be satisfied; that a suit to administer the affairs of the company had been instituted in Chancery, and was still pending, but it did not distinctly appear, whether the defendant was a member of the company, at the time of execution. The question was, whether under these circumstances a scire facias should not have issued before execution.

*Per Cur.* (*Parke*, B., *dubitante*).—A scire facias is only resorted to for the specific purpose of making the judgment and execution consistent with each other, otherwise judgment would appear as given against A., while execution would be described as issuing against B. This would render the record absurd; but, by the award of a scire facias, it is rendered technically proper. Where a scire facias is allowed against a party, he has the opportunity of contesting whether he is within the provisions of the act or not. Further than that, the scire facias was never intended to go; and, therefore, it appears to the majority of the Court, that if we were to comply with the argument used on the part of the defendant, and hold a scire facias necessary in this case, it would be attended with great inconvenience, and render an infinite series of these writs necessary; for, as he is not rendered liable by the provisions of this act, unless he were a member at the time of execution, and the scire facias would only establish that he was such at the time of the judgment, no execution could issue against him, until a fresh scire facias was issued, to shew that he was such at the time execution issued; and, consequently, toties quoties, there should be a fresh scire facias. This never could have been the intention of the legislature, but would, undoubtedly, be the consequence if this act were to be interpreted as contended for.—*Rule discharged.*

CROSS *v.* LAW, T. T. 1840. Ex. 6 *M. & W.* 217; S. C. 8 *D. P. C.* 789—S. P. BOSANQUET *v.* ROUSFORD, H. T. 1840. K. B. 3 *P. & D.* 298.

A JUDGMENT had been obtained against a banking company, sued in the name of their public officer, under the 7 Geo. 4, c. 46, s. 13. On a rule to shew cause why a suggestion should not be entered on the roll against them, as shareholders, for the damages and costs; and why execution should not issue against them, or any of them, for the same.

But a different rule is now laid down.

*Per Cur.*—Our first impression was, that when once judgment had been obtained against the public officer of the company, it was competent for the Court, on deliberate inquiry into all the circumstances of the case, to allow a suggestion to be entered on the record, for the purpose of making the other members liable. But when we consider the question which that inquiry would involve, when we see that it might be one affecting the whole fortune of the individual sought to be charged, it does appear to be an unjust course if we were to determine that way. A scire facias is, under such circumstances, a far more appropriate means of inquiry than any we could institute; for, if the facts be disputed, the matter would come on to be tried in the shape of an issue, when the party sought to be affected would have all the benefit of a bill of exceptions. That is an advantage which the proceedings by scire facias would give him; and these matters being of great importance in themselves, it is highly necessary that every means should be taken to secure a correct determination on the facts.

## Bank of England*.

(*See* 3 & 4 *Will.* 4, *c.* 98).

DE LA CHAUMETTE *v.* BANK OF ENGLAND, H. T. 1829. K. B. 9 *B. & C.* 208.

IN an action against the Bank of England, it appeared that a Bank of England note had been stolen, became circulated in France, and was transmitted by a merchant in France to his correspondent in England in part payment of an account; but the English correspondent made no advance upon the credit of the note.

A stolen note was passed at Paris and remitted to an agent to present for payment:—Held, that the agent must recover on the principal's title, and therefore shew that value was given for it.

*Per Cur.*—Unless we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co. (the parties remitting the note from France), and that, if he can recover at all, it must be upon their right. Then that brings it to the question, whether Odier & Co. could recover; and that appears to involve a point, whether Odier & Co. gave such value for the note as to exempt them not only from any reasonable ground of suspicion of any knowledge that it had been improperly obtained, but also from the charge of any want of caution in the taking of it.

* The Bank is bound to use due diligence in passing a power of attorney for the sale of stock. (*Sutton* v. *Bank of England*, E. T. 1824, N. P., 1 R. & M. 52; S. C. 1 C. & P. 193).

BANK OF ENGLAND *v.* DAVIS, H. T. 1826. K. B., *in error from* C. P. (2 *Bing.* 393), 5 *B. & C.* 185; S. C. 7 *D. & R.* 828.

In an action against the Bank for not paying dividends on stock, it is necessary to state that they actually received the amount of the dividends from government, and the omission of the allegation is not aided by verdict.

ACTION on the case for not paying dividends on stock. The declaration stated that the plaintiff was lawfully possessed of the stock in question; that he had not authorized any transfer of it; and that the defendants, contrary to their duty, had refused to pay him the dividends; but each count omitted to state that the Bank had themselves the dividends from government. It was objected, that this omission was fatal; and—

The Court considered it could not be answered. It certainly was no part of the duty of the Bank to pay unless they received; and it was not averred that they had received. Such a want of substantial averment could not be cured by verdict.

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WILLIS *v.* BANK OF ENGLAND, M. T. 1835. K. B. 5 *N. & M.* 478; S. C. 1 *Ad. & E.* 21.

Under 7 Geo. 4, c. 46, bank post-bills, issued by the Bank in London, are not payable at the branch banks in the country.

IN this case the Court, with reference to bank post-bills, said—It has been contended, and we think rightly, that these bills were not presented for payment to the branch bank; for, though the 7 Geo. 4, c. 46, s. 15, requires that bank post-bills issued by the branch banks shall be payable there, as well as in London, yet the converse is not enacted; and bank post-bills, issued in London, are not payable at the branch banks.

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WILLIS *v.* BANK OF ENGLAND, M. T. 1835. K. B. 5 *N. & M.* 478; S. C. 1 *Ad. & E.* 21.

Where notice of an act of bankruptcy is given to the Bank of England, the Bank is liable for a payment made at a branch bank.

BY the 7 Geo. 4, c. 46, s. 15, the governor and company of the Bank of England may empower agents to carry on the trade and business of banking, for and on their behalf. Notice of an act of bankruptcy having been committed by A. was given to the Bank of England in London, on 16th March and 8th April, and on the 12th April two bank post-bills, indorsed in blank, were delivered by A. to S., that he might obtain cash for them from the branch bank at Gloucester; and S., being acquainted with the agent there, obtained cash for the bills from the branch bank, and, by the direction of the agent, indorsed the bills—"Pay the governor and company of the Bank of England."

Held, first, that these bills could not be considered as having been presented for payment to the branch bank; because, although the act makes bills issued by the branch bank payable there as well as in London, it does not make bills issued in London payable at the branch banks; and they must be considered as having been presented for change, as at any other bankers. But, whether the payments were made by way of purchase of the bills, or in discharge of the defendant's liability as acceptors, they were not protected by the 82nd section, such previous notice of the act of bankruptcy having been given to the Bank of England should have been communicated by the Bank to the branch banks.

FRANKLIN *v.* BANK OF ENGLAND, H. T. 1829. K. B. 9 *B. & C.* 156; S. C. 4 *M. & R.* 11.

An action lies by an executor against the Bank of England, for not transferring stock, notwithstanding a specific bequest of such stock.

JOHN Franklin, by his will bearing date the 29th November, 1832, attested by three witnesses, gave, devised, and bequeathed unto Thomas Franklin, the manors, messuages, lands, freehold, leasehold, and copyhold estates, hereditaments and premises therein mentioned and described, to hold the same unto the said Thomas Franklin for the term of his life without impeachment of waste; and after the decease of the said Thomas Franklin, the said testator gave, devised, and bequeathed the same unto George Jones Bevan and his heirs, to the uses therein and thereinafter mentioned; that is to say, to the use of the said testator's grandson, Richard Franklin, who was the son of the said Thomas Franklin, and his assigns, for his life, without impeachment of waste; with remainder to the use of the said George Jones Bevan, in trust to preserve contingent remainders; with several remainders and limitations over in tail, in favour of the issue of the said Richard Franklin and of the said Thomas Franklin, and with the ultimate limitation to his (the testator's) own right heirs. And the said testator, by his said will, gave and bequeathed all the monies which he might have, at the time of his decease, in the Three per Cent. Consolidated Bank Annuities, or any other public funds, unto his cousin, Catherine Bevan, spinster, since deceased, and the said George Jones Bevan, and the survivor of them, upon the trusts, for the several uses, intents, and purposes therein and hereinbefore mentioned and referred to, concerning his real estates thereinbefore devised, or as near thereto as the nature of the respective estates would admit. And, after giving certain legacies of trifling value therein mentioned, the said testator, by his said will, gave, devised, and bequeathed, all the rest, residue, and remainder of his goods, chattels, real and personal estate, whatsoever and wheresoever, subject to the payment of his just debts, funeral, and testamentary expenses, the foregoing legacies, and also such other legacies as he might bequeath in and by a codicil, which the said testator declared he intended to add to that his will, unto the said Thomas Franklin, his heirs, executors, administrators, and assigns, to and for his and their own use absolutely; and he thereby nominated and appointed the said Thomas Franklin sole executor thereof. By a codicil to his will, dated the 28th November, 1824, executed in the presence of and attested by two witnesses, the said testator, amongst other things, bequeathed unto the said Richard Franklin the sum of 10,000*l.*; with the payment of which sum he charged all his real and personal estate devised and bequeathed by his said will; and he thereby, in all other respects, confirmed his said will. The sum of 16,000*l.* Consolidated Three per Cent. Annuities, was standing in the name of the testator, John Franklin, in the books of the Bank of England on the 29th November, 1823, the date of his will; and on the 22nd March, 1823, the further sum of 500*l.*, like annuities, was transferred into the name of the said John Franklin in the books of the said company, making together, the sum of 16,500*l.*; and on the 29th November, 1824, the said John Franklin died. Thomas Franklin, the executor, on the 30th December 1824, proved the said will and codicil in the Prerogative Court of Canterbury; and on the 2nd January, 1825, caused the same to be registered in the books of the Bank, where an extract

of so much as related to the said annuities was duly entered. On or about the 3rd of February, 1825, Thomas Franklin demanded permission of the Bank to transfer the whole of the said annuities to such persons as he should think fit, to enable him to pay the testator's debts and legacies, when the officers of the Bank refused to permit him to make such transfer, on the ground and by reason that the said sum of stock ought to be transferred into the names of the said Catherine Bevan and George Jones Bevan, to whom the same was given and bequeathed by the said will. A bill had been filed by the said Thomas Franklin in the High Court of Chancery, to compel the Bank to allow the said plaintiff to sell and transfer the said stock. No evidence was given in the suit that there were any debts due or owing by the said estate at the time of such demand.

The question for the opinion of the Court was, whether, under the circumstances above stated, Thomas Franklin, the executor, had any right of action against the Bank for not permitting the transfer by him of the said 16,500*l.* Three per Cent. Consols.

And the Court certified to the Lord Chancellor that the executor might sue the Bank for not permitting the transfer of the stock.

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# Bank Note.

SNOW *v.* SADDLER, T. T. 1826. C. P. 3 *Bing.* 610.

Where it was doubtful whether the defendant had taken a 30*l.* note from his bankers or a stranger, and the jury found for the plaintiff, who had lost it, the Court granted a new trial.

THIS was an action of trover for a bank note. It appeared from the evidence of one witness that the defendant had admitted taking the note from his bankers or at Doncaster, and that he had stated to another witness that he had received the note, upon a settlement of bets he had made, from a stranger at Doncaster. The note for 30*l.* had been lost by the plaintiff's clerk in London. The plaintiff had proclaimed the loss. *Best*, C. J., directed the jury to find for the defendant; but they gave a verdict for the plaintiff. On motion for a new trial, it was contended, that the defendant had used due caution under the circumstances, and that it was impossible in the hurry at a race to use greater caution.

The Court granted a new trial on payment of costs.

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STRANGE *v.* WIGNEY, T. T. 1830. C. P. 6 *Bing.* 677.

Where the loss of a bank note of 100*l.* was proclaimed by hand-bills, and the defendant, a country banker, cashed it for a stranger, who merely gave his name and address :—Held,

THE plaintiff, who had arrived from the country, took a hackney coach, and by accident left her reticule in the coach, which contained a 100*l.* bank post-bill; immediately upon the loss, which happened in London, she circulated hand-bills and advertised in the Morning Advertiser. Eight days afterwards, the defendant, a banker at Brighton, cashed the note for a stranger, who wrote an illiterate hand and merely signed a name and false address. The banker, the defendant, had received no notice of the loss. In an action of trover for the note, *Tindal*, C. J., left it to the jury to say whether the defendant had used ordinary care, or whether the plain-

tiff had given sufficient publicity to the loss. The jury found for the plaintiff. On motion for a new trial—

that he was liable for the amount of the note*.

*Per Cur.*—We cannot interfere. The jury have found there was a want of caution on the defendant's part; and we think the defendant should have made some inquiry, the party being a stranger, or have had some reference to some person who knew him in the town; besides, the party writing an illiterate hand was enough to create suspicion; and the defendant should not have been satisfied with a stranger's bare assertion as to his name and address.

*See Wookey* v. *Pole*, 4 B. & A. 1; *Gorgier* v. *Melville*, 3 B. & C. 45; *Gill* v. *Cubitt*, 3 B. & C. 477; *Eastby* v. *Crockford*, 10 Bing. 245; *Foster* v. *Pearson*, 1 M. & R. 855; *Crook* v. *Jades*, 5 B. & Ad. 909; *Backhouse* v. *Harrison*, Ib. 1098; *Goodman* v. *Harvey*, 4 Ad. & E. 870.

* A party who takes a large Bank of England note from a stranger is bound to use due caution; hence, where a banker in a small market town changed a note for 500*l.* for a stranger, merely taking his name:—Held, that he was liable in trover to the party from whom it had been stolen. Held, also, that a statement by a porter (since dead), that he had lost the note, was sufficient evidence to shew the circumstances under which the note had been circulated. (*Best*, C. J.—*Snow* v. *Peacock*, M. T. 1824, N. P., 2 C. & P. 215.

Circumstances tending to shew that a note has been lost, is sufficient in an action for money had and received brought by the owner against a party in whose possession it is traced. (*Abbott*, C. J.—*Holiday* v. *Sigil*, M. T. 1826, N. P., 2 C. & P. 176).

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